



An appeal

- by -

Tomas Zavala  
(“Mr. Zavala”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2012A/83

**DATE OF DECISION:** September 25, 2012

## DECISION

### SUBMISSIONS

Tomas Zavala	on his own behalf
Laurence Earl Brewin	on his own behalf
Rod Bianchini	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 Tomas Zavala (“Mr. Zavala”) of a Determination of a delegate (the “Delegate”) of the Director of the Employment Standards (the “Director”) issued on June 7, 2012. The Determination ordered Mr. Zavala to pay his former employee, Laurence Earl Brewin (“Mr. Brewin”), a total of \$6,397.90, representing outstanding wages, overtime, statutory holiday pay, annual vacation pay and accrued interest.
2. The Determination also imposed upon Mr. Zavala three (3) administrative penalties of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for breaches of sections 17 and 18 of the *Act* and section 46 of the *Regulation*.
3. Mr. Zavala appeals the Determination on the sole ground that new evidence has become available that was not available at the time the Determination was being made.
4. Mr. Zavala is seeking the Tribunal to change or vary the Determination. Based on his written submissions, it would appear that he wants the Determination varied so that the wages payable to Mr. Brewin in the Determination are reduced to \$1,413.22.
5. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s. 103), and Rule 8 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 may be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination (the “Reasons”).

### ISSUE

6. Has new evidence become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing or varying the Determination in any manner?

### FACTS

7. Mr. Zavala operated a transportation business and employed Mr. Brewin as a short haul truck driver from October 3, 2011, to November 18, 2011. Mr. Brewin resigned from his employment on November 18, 2011, and, thereafter, on November 21, 2011, filed a complaint against Mr. Zavala alleging that the latter contravened the *Act* by failing to pay him regular wages, overtime pay, statutory holiday pay and annual vacation pay (the “Complaint”).

8. The Delegate investigated the Complaint and, before issuing the Determination, scheduled a mediation meeting between the parties on March 12, 2012. The mediation meeting was cancelled when Mr. Zavala failed to attend. Thereafter, on March 13, 2012, the Delegate sent Mr. Zavala a letter outlining Mr. Brewin's claims and enclosing a Demand for Employer Records, a copy of Mr. Brewin's complaint form, and all reliance documents of Mr. Brewin, with a view to affording Mr. Zavala an opportunity to respond. On March 22, 2012, Mr. Zavala sent the Delegate a set of documents that he referred to as the "daily manifest" prepared by Mr. Brewin during his employment with Mr. Zavala from October 3, 2011, to November 18, 2011.
9. Subsequently, the Delegate scheduled a fact-finding meeting on May 3, 2012, but on May 2, 2012, Mr. Zavala left the Delegate a voice-mail message advising that he would not attend the meeting but he would produce documents relating to Mr. Brewin's claims. As a result, the fact-finding meeting was cancelled and the Delegate sent an email to Mr. Zavala on the same date confirming that Mr. Zavala had chosen not to attend the meeting and that he (the Delegate) would proceed with the investigation of the Complaint by way of written submissions. The Delegate requested Mr. Zavala to provide his written submissions and documents by May 4, 2012. However, Mr. Zavala failed to provide any written submissions or documents to the Delegate.
10. In the Reasons, the Delegate summarizes the evidence of both parties he obtained in his investigation of the Complaint, starting with Mr. Brewin's evidence. The Delegate notes that Mr. Brewin said that he responded to an advertisement placed by Mr. Zavala on Craigslist in September 2011 for a position of a truck driver with a rate of pay of \$4,500.00 per month, based on 45 – 50% commission on deliveries. Mr. Brewin states that he responded to the said advertisement by sending his résumé by email to Mr. Zavala. Subsequently, Mr. Zavala placed a second advertisement with a telephone number, and Mr. Brewin called the telephone number and left a voice-mail message asking Mr. Zavala to call back. Mr. Zavala returned his call and the two discussed the job advertised by Mr. Zavala. Mr. Brewin asserted that he insisted that he would only work at an hourly rate and not on a commission basis and Mr. Zavala ultimately agreed to hire him on an hourly rate of \$18. Mr. Brewin also claimed that Mr. Zavala advised him that he would earn approximately \$2,250 every two (2) weeks, and that he would be paid on the 15<sup>th</sup> and end of each month. Mr. Brewin submitted that at no time during his employment did he agree to work on a commission basis.
11. During his employment with Mr. Zavala, Mr. Brewin indicated that he commenced work each day by arriving at the location of the delivery vehicle. Most times, he collected the vehicle at the Patterson Skytrain Station. At the end of his shift, he would drop it off at the same location. He also submitted that Mr. Zavala told him that he would not be paid for any time spent by him performing vehicle inspection or when he was on stand-by or when he drove an empty truck or performed a delivery where the cost of delivery only covered the cost of the package being delivered.
12. Mr. Brewin also submitted that he kept track of his daily hours worked and submitted to the Delegate, in the investigation, a copy of his timesheets. The timesheets show the work dates, start times, stop times, and total daily hours worked. In the Reasons, the Delegate summarizes the hours recorded on the timesheets show a total of 224 hours worked by Mr. Brewin in October 2011 and another 165.5 hours worked in November 2011, before Mr. Brewin resigned from his employment on November 18, 2011.
13. In terms of the payments he received from Mr. Zavala during his employment, the Delegate notes in the Reasons that Mr. Brewin admitted to receiving a cash payment in the amount of \$500.00 from Mr. Zavala on October 21, 2011, a cheque in the amount of \$1,244.00 on October 31, 2011, and a final cash payment in the amount of \$300.00 on November 14 or 15, 2011, for a grand total of \$2,044.00. He also received another \$200.00 in the form of reimbursement to cover his gas expenses. Mr. Brewin produced a copy of a cheque he

received from Mr. Zavala for \$1,244.00 gross wages dated October 31, 2011, a copy of a paystub provided to him by Mr. Zavala for the pay period from October 3, 2011 to October 21, 2011, as well as a copy of handwritten timesheets showing the days and hours he worked. These documents were disclosed to Mr. Zavala during the investigation.

14. With respect to Mr. Zavala's evidence in the investigation, the Delegate notes that Mr. Zavala spoke with a delegate at the Employment Standards Branch on or about March 26, 2012. He informed that delegate that although he hired Mr. Brewin for the position of a truck driver at the rate of pay of \$18/hour, there was a subsequent arrangement with Mr. Brewin that the latter would be paid on a commission basis because he (Mr. Zavala) was not making sufficient monies to justify the \$18/hour rate he was paying Mr. Brewin. Mr. Zavala also disputed the accuracy of the hours Mr. Brewin listed on his timesheets and argued that Mr. Brewin worked fewer hours than what he was claiming. Mr. Zavala submitted, as proof in support of his assertion, a copy of the manifests prepared by Mr. Brewin from October 3, 2011, to November 18, 2011, which showed less than the hours Mr. Brewin claimed in his timesheets.
15. The Delegate, after reviewing the evidence of the parties, in the Reasons, notes that when Mr. Zavala hired Mr. Brewin at \$18/hour and then later claims to have changed the arrangement to a commission rate, Mr. Zavala failed to provide details and evidence regarding the commission rate. More particularly, the Delegate notes that Mr. Zavala failed to provide any payroll records, other than manifests, to counter Mr. Brewin's claims of hours worked. However, the Delegate notes Mr. Brewin, on the other hand, provided a copy of a wage statement provided by Mr. Zavala for the pay period from October 3, 2011, to October 21, 2011, which also did not list his wage rate, but showed his pay at \$1,744.00 in the commission column of the wage statement, with the word "commissions" on the statement crossed out. The Delegate interpreted this document to mean that Mr. Brewin's rate of pay was not based on commission. The Delegate also noted that in the absence of any payroll records from Mr. Zavala, he could not verify or confirm the commission rate, and went on to find Mr. Brewin was hired on the basis of an hourly rate of \$18 during his relatively short employment period with Mr. Zavala.
16. With respect to the apparent inconsistencies between the hours recorded in the manifests and Mr. Brewin's timesheets, the Delegate stated:

Mr. Zavala disputed the hours Mr. Brewin claimed he worked as noted in Mr. Brewin's time sheets. He provided a copy of manifests written by Mr. Brewin. The manifests showed the daily trips made by Mr. Brewin and the time spent for each trip. I have reviewed Mr. Brewin's time sheets and the manifests. Both records consistently showed the same dates Mr. Brewin worked for Mr. Zavala. I find that the dates Mr. Brewin worked are not in dispute.

With regards to the hours worked per day, I note that the manifests showed the arrival and departure time for each delivery. Mr. Brewin stated that he commenced work each day upon arriving at the location of his vehicle. For most part [sic], he collected a vehicle near the Patterson Skytrain Station and dropped it off at that location at the end of his shift. This pickup and drop off location of the vehicle does not appear on the manifests. Mr. Brewin would have spent time to travel from the place where he picked up the vehicle to the first job site and also spent time returning the vehicle at the end of his shift. I find that Mr. Brewin started his shift when he collected the vehicle from the designated location and ended his shift when he dropped off his vehicle at the designated location. Accordingly, the manifests only shows [sic] the daily deliveries made and the time spent but do not show the actual hours worked by Mr. Brewin. I have reviewed Mr. Brewin's time sheets. They are consistent with the days noted in the manifests and the hours listed are reasonable. There is no evidence before me to dispute the accuracy of the time sheets. Accordingly, I accept Mr. Brewin's time sheets as the best evidence made available to me that shows the actual hours worked by Mr. Brewin. Accordingly, I will base the wages earned by Mr. Brewin based on these time sheets.

17. The Delegate then went on to note, based on Mr. Brewin's timesheets, he worked a total of 389.5 hours for Mr. Zavala during his employment period, of which 295.75 hours should have been paid at the regular wage rate of \$18/hour and 93.75 hours at the overtime rate of time and one-half, being \$27/hour, based on section 37.3 of the *Regulation*. The Delegate also noted that Mr. Brewin should have received pay for a statutory holiday, namely, Remembrance Day, as he was employed for more than 30 calendar days before the said statutory holiday and worked for 15 of the 30 calendar days preceding that statutory holiday. The Delegate also noted that Mr. Brewin was owed annual vacation at 4%, and interest on all of the amounts he was owed, pursuant to section 88 of the *Act*. The Delegate then considered the payments Mr. Brewin received from Mr. Zavala totalling \$2,044.00, which the Delegate credited to Mr. Zavala, leaving the balance owing to Mr. Brewin of \$6,293.42.
18. Furthermore, as indicated previously, the Delegate also levied three (3) administrative penalties of \$500.00 each: the first penalty was for breach of section 17 of the *Act* for failure by Mr. Zavala to pay wages to Mr. Brewin at least semi-monthly and within eight (8) days after the end of a pay period; the second penalty was for breach of section 18 of the *Act* for failing to pay all wages owing to Mr. Brewin within 48 hours after the employer terminates the employment or within six (6) days if the employee quits; and the third administrative penalty was for breach of section 46 of the *Regulation* as Mr. Zavala failed to comply with a Demand for Employer Records issued to him by the Delegate on March 13, 2012, when he failed to deliver any and all payroll records relating to Mr. Brewin's wages as specified in section 28 of the *Act*.

### **SUBMISSIONS OF MR. ZAVALA**

19. Mr. Zavala, in support of his appeal, has provided written submissions. In the preamble to his written submissions, Mr. Zavala states that he is appealing the Determination because Mr. Brewin has given false or wrong information "of the conditions, payout commission rate and pay periods and other important details of his employment". He indicates that it is his intention in this appeal to "explain the real conditions in which Mr. Brewin was hired since his first day of employment".
20. In the ensuing submissions, particularly the first two (2) pages of the 3.5 pages of submissions, Mr. Zavala goes on to explain how his business works and how commission-based pay for truck drivers predominates in his industry. He appears to reiterate the evidence he adduced in the investigation of Mr. Brewin's complaint that while Mr. Brewin did start working at \$18/hour, his pay rate was changed to commission pay as he (Mr. Zavala) could not afford to pay him on an hourly rate basis any more. Mr. Zavala also states that Mr. Brewin agreed to the commission pay arrangement. He also notes that when Mr. Brewin's pay rate changed to commission, Mr. Brewin was informed there would be no overtime pay. He also submits that Mr. Brewin was informed that pay for statutory holidays, annual vacation and CPP was included in his 45% commission rate. According to Mr. Zavala, Mr. Brewin agreed to this arrangement. Mr. Zavala also indicates that he found Mr. Brewin not suitable as a truck driver because Mr. Brewin was too costly for his operation and, therefore, Mr. Zavala decided to stop operating his truck.
21. Mr. Zavala states based on the commission arrangement with Mr. Brewin, he owes Mr. Brewin \$1,413.22. Mr. Zavala's calculation is derived from documents he adduces in the appeal for the first time showing that the income he generated from third parties like Eagle Messenger Service using Mr. Brewin totalled \$7,682.73. He states that 45% of that amount is \$3,457.22. Having paid Mr. Brewin \$2,044.00 previously, Mr. Zavala subtracts the paid amount from \$3,457.22, which shows the balance owing to Mr. Brewin of \$1,413.22, according to Mr. Zavala.
22. Mr. Zavala then goes on to point out that Mr. Brewin had at least two (2) vehicle accidents, and there were ICBC insurance claims made, in which Mr. Brewin was 50% at fault for the first accident and 100% at fault

for the second accident. The truck was damaged in these accidents. Mr. Zavala also points out that in one instance, a ladder that was being delivered by Mr. Brewin was damaged for which Mr. Zavala had to pay \$158.49. He did not produce this information previously in the investigation of the Complaint. He also did not show the invoice for the repair of the damaged item which he now produces in the appeal for the first time although the date of the invoice is September 21, 2011, and the pictures of the damaged ladder appear to be sent to him via email on November 1, 2011, during the investigation and well in advance of the Determination.

23. Mr. Zavala also points out that Mr. Brewin had a WCB claim for a work-related injury arising from one (1) of the two (2) accidents in which he was involved, but that claim was rejected. He also points out the efforts he made with Mr. Brewin to achieve a resolution, but to no avail.
24. In his final Reply, Mr. Zavala now states that he has all the documents that he needs to back him up and appears to be asking for a “new date” for a meeting between the parties to “get the facts on the table”. He is seeking a new delegate for this purpose.

### **SUBMISSIONS OF THE DIRECTOR**

25. The Director submits that the Delegate, in the Reasons, has set out a history of attempts made by the Delegate to engage Mr. Zavala in the investigation. The Director further submits that Mr. Zavala is now producing in the appeal documents and evidence he should have previously produced since it is the sort of evidence that was previously available.
26. The Director also notes that Mr. Zavala was issued a Demand for Employer Records but he responded by simply providing the manifests without clarification, although he was asked to provide further information and evidence.
27. Finally, the Director submits that Mr. Zavala is simply re-arguing his case and, therefore, his appeal should be dismissed.

### **SUBMISSIONS OF MR. BREWIN**

28. In his submissions, Mr. Brewin responds to the submissions of Mr. Zavala that reiterate the evidence the latter adduced during the investigation of the Complaint. I do not find it necessary to reiterate those submissions here in light of my decision in this appeal.

### **ANALYSIS**

29. Mr. Zavala bases his appeal on subsection 112(1)(c) of the *Act*, namely, evidence has become available that was not available at the time the Determination was being made. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal considered the circumstances in which new evidence will be admitted and set out four (4) conditions that must be met before new evidence will be considered:

- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- The evidence must be relevant to a material issue arising from the complaint;

- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence have led the Director to a different conclusion on the material issue.

30. The four (4) criteria above are a conjunctive requirement and, therefore, in this case, Mr. Zavala, who is requesting the Tribunal to admit new evidence, has the onus to satisfy each of them before the Tribunal will admit any new evidence.
31. Having said this, in this case, I am not satisfied that Mr. Zavala has met the first criterion in *Re: Merilus Technologies, supra*. The evidence Mr. Zavala wishes to adduce as “new evidence” in this appeal is not evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made. In this case, Mr. Zavala, during the investigation of the Complaint, was invited to participate in a mediation, as well as a fact-finding meeting, and he was also served with a Demand for Employer Records which he failed to fully respond to. He had ample opportunity to give his “story” during the investigation and produce all reliance documents. I note, while the Delegate in the Reasons considered the evidence Mr. Zavala gave to a delegate in a telephone call on March 26, 2012, during the investigation, in the appeal, Mr. Zavala largely reiterates that same “story” and now appears to adduce for the first time more details and additional documentation that previously existed during the investigation. Mr. Zavala does not explain why he did not provide the Delegate the additional evidence and documentation previously.
32. The documents Mr. Zavala failed to adduce previously include third party deposit slips and documents showing the amount earned by Mr. Zavala as a result of the delivery efforts of Mr. Brewin. There are also pictures of the allegedly damaged ladder for which Mr. Zavala had to pay \$158.49 to a customer. All of these documents predate the Determination and existed during the investigation of the Complaint, but Mr. Zavala did not produce them and does not explain why he did not do so. In the circumstances, I find that Mr. Zavala has failed the first of the fourfold test in *Re: Merilus Technologies, supra*, and it is not necessary for me to review Mr. Zavala’s new evidence in relation to the balance of the tests. Notwithstanding, I feel compelled to point out that the evidence Mr. Zavala has adduced as “new evidence” in the appeal including evidence of alleged accidents Mr. Brewin was involved in and the latter’s WCB claim and the outcome of that claim as well as the payment by Mr. Zavala for the damaged ladder, in my view, is of suspect relevance, and I do not think it would qualify as evidence of high potential probative value in the sense that, if believed, it could on its own or when considered with other evidence have led the Director to a different conclusion on the material issue in this case, namely, whether the payment arrangement between Mr. Zavala and Mr. Brewin was based on an hourly rate or on a commission basis.
33. I also agree with the Director that Mr. Zavala’s appeal submissions effectively amount to a re-argument, which is not admissible on appeal. An appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced in the investigation stage and properly rejected in the Determination. An appeal is also not a forum for the unsuccessful party to submit for the first time evidence that was otherwise available during the investigation stage.
34. I am also mindful of the purposes of the *Act* and wish to add that a further compelling reason for not allowing Mr. Zavala’s appeal or denying him a further opportunity to re-argue his case or adduce evidence that he could have adduced during the investigation of the Complaint, is that it is inconsistent with one of the fundamental purposes of the *Act* set out in section 2(d), namely, to provide fair and efficient procedures to resolve disputes.

**ORDER**

35. Pursuant to section 115(a) of the *Act*, I order that the Determination be confirmed as issued, together with any further interest that may have accrued pursuant to section 88 of the *Act*.

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