Employment Standards TRIBUNAL

An appeal

- by –

1079640 B.C. Ltd. coba Yummy Pizza
(the "Company")

- 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.: 2017A/93

DATE OF DECISION: October 3, 2017

DECISION

SUBMISSIONS

Richard D. Duchesne on behalf of 1079640 B.C. Ltd. coba Yummy Pizza

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), 1079640 B.C. Ltd. coba Yummy Pizza (the "Company") has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 22, 2017.

2. It should be noted that the time and date for filing the appeal was 4:30 p.m. on July 31, 2017. While the Company's appeal form dated July 10, 2017, was received by the Tribunal on July 11, 2017, it did not include submissions on the merits of the appeal or a complete copy of the Determination or the written Reasons for the Determination (the "Reasons"). However, the appeal included the Company's application for an extension of time to file its appeal and supporting written submissions of Rick D. Duchesne ("Mr. Duchesne"), one of the two directors of the Company.

3. The Determination found that the Company contravened sections 58 and 63 of the *ESA* and ordered the Company to pay a former employee, Omid Alex Armankhah ("Mr. Armankhah"), $1,505.59 consisting of compensation for length of service, vacation pay and accrued interest. The Determination also levied an administrative penalty of $500 against the Company. The total amount of the Determination is $2,005.59.

4. The Company appeals the Determination contending, under section 112(1(a) and (b) of the *ESA*, that the Director erred in law and breached the principles of natural justice in making the Determination. The Company is seeking the Tribunal to cancel the Determination.

5. After receiving the Company's appeal form and request for an extension of time to file the appeal, the Tribunal sent Mr. Duchesne a letter requesting the Company to provide, by 4:00 p.m. on July 31, 2017, the following three items: (i) a complete copy of the Determination, (ii) the Reasons, and (iii) detailed submissions of the Company on the merits of the appeal.

6. On July 14, 2017, the Company sent the Tribunal the Determination and the Reasons but not submissions on the merits of the appeal.

7. On July 19, 2017, Mr. Duchesne emailed the Tribunal requesting an extension of time to file the Company's appeal submissions by August 31, 2017.

8. In correspondence dated July 24, 2017, the Tribunal notified the parties, among other things, that no submissions are being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, Tribunal will invite Mr. Armankhah and the Director to file a reply to the question of whether to extend the deadline for the Company to file the appeal and may request submissions on the merits of the appeal. In such case, the Company will be given an opportunity to make a final reply to the submissions, if any.

9. In the same correspondence, dated July 24, the Tribunal requested the Company to provide its written reasons and argument for the appeal and any supporting documents by 4:00 p.m. on August 31, 2017. The

Tribunal also clarified that this deadline was only for the Company to provide the requested documents and not an extension of the deadline to file the appeal.

10. On August 18, 2017, the Tribunal received the section 112(5) "record" (the "Record") from the Director and forwarded a copy of the same to the Company, and provided the latter an opportunity to object to its completeness by September 1, 2017. The Company did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.

11. On August 30, 2017, the Company sent the Tribunal its written submissions on the merits of the appeal.

12. On September 11, 2017, the Tribunal shared the Company's written submissions on the merits of the appeal with Mr. Armankhah and the Director and advised the parties that the appeal had been assigned to a Tribunal Member who may, without seeking submissions from the parties, dismiss all or part of the appeal and/or confirm all or part of the Determination.

13. I have decided that this appeal is an appropriate case for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based on the Company's appeal form, the Determination, the Reasons, the Record and the Company's late submissions on the merits of the appeal. Under section 114(1) of the *ESA*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1), Mr. Armankhah and the Director will be invited to file a reply to the question of whether to extend the deadline for the Company to file the appeal and to make submissions on the merits of the appeal. The Company will then be given an opportunity to make a final reply to the submissions, if any.

ISSUES

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

THE BACKGROUND FACTS AND FINDINGS OF THE DIRECTOR IN THE REASONS FOR THE DETERMINATION

15. The BC Online: Registrar of Companies — Corporation Search conducted by the delegate of the Director on February 28, 2017, indicates the Company was incorporated on June 16, 2016, and Mr. Duchesne and Klara Albert ("Ms. Albert") are its directors.

16. The Company operates a pizza delivery and take-out restaurant and employed Mr. Armankhah from September 15, 2014, to February 11, 2017, with his last role as a Manager.

17. On February 27, 2017, Mr. Armankhah filed a complaint under section 74 of the *ESA* alleging that the Company contravened the *ESA* by failing to pay him all wages owed under the *ESA* (the "Complaint").

18. In the Reasons, the delegate notes, Mr. Armankhah signed a document dated July 7, 2016, in favour of the Company purporting to release the Company from "all liability relating to overtime pay" (the "Release"). The Release also states that by signing the document Mr. Armankhah "...forfeits all right to...claims filed with Employment Standards" against the Company.

19. The issues or questions before the delegate at the hearing of the Complaint were threefold, namely: (i) Is the Release effective? (ii) Is Mr. Armankhah owed regular wages? If so, how much? (iii) Is Mr. Armankhah owed compensation for length of service? If so, how much?

20. Since the appeal largely turns on the questions of whether the Company was denied an opportunity to respond to the Complaint contrary to the principles of natural justice and whether the delegate erred in law in not giving effect to the Release and/or determining that Mr. Armankhah was terminated from his employment, I will only refer to the evidence and matters pertinent to these questions below.

21. With respect to the natural justice question, after Mr. Armankhah filed the Complaint and the delegate of the Director sent the same to the Company, Mr. Duchesne responded with some written submissions to the delegate and also appears to have shown interest in wanting to mediate the Complaint. More particularly, in his email to the delegate on April 4, 2017, he indicates that he would prefer April 20, 2017, to hold a mediation session to deal with Mr. Armankhah's Complaint.

22. Subsequently, by email dated April 5, 2017, the delegate sent both parties a copy of the Notice of Mediation Session confirming that a mediation of the Complaint is scheduled at 9:30 a.m. to 12:30 p.m. on Thursday, April 20, 2017, at the office of the Employment Standards Branch (the "Branch) in Richmond, British Columbia. The email and the Notice of Hearing both state that if the Complaint is not resolved at the mediation then a hearing would take place on Thursday, June 1, 2017 (the "Hearing Date").

23. On April 11, 2017, Mr. Duchesne sent the delegate an email stating that he was not available on April 13 but he was fine with April 20, the originally scheduled date for the mediation. It is not clear if Mr. Duchesne was confused about the date for the mediation session. The delegate then responds to Mr. Duchesne's email on the same date confirming that the mediation is "still currently scheduled for the same original date", that is, on April 20, 2017. She also provides a conference ID for Mr. Duchesne to call-in. Mr. Duchesne does not respond to the delegate's last email until on April 20, 2017, the date of the scheduled mediation. At 10:03 a.m. on April 20, 2017, after the mediation should have commenced, Mr. Duchesne sends an email to the delegate advising "I am not able to make the call today… [sic] this mediation fell on 420 event downtown…[sic] I will need to rebook."

24. On May 1, 2017, the delegate sent by email and registered mail a Notice of Complaint Hearing (the "Notice") and Demand for Records to both Mr. Duchesne and Ms. Albert. The Canada Post tracking sheet in the Record shows that these documents were delivered to the Company's operating address on May 4, 2017. The Notice states "[t]he Adjudicator may make a Determination based on information before them, even if you choose not to participate at the hearing". The Demand for Records required that the Company's documents be sent to the Branch no later than May 15, 2017.

25. On May 3, 2017, Mr. Duchesne sent an email to the delegate requesting the telephone number of the "assigned Adjudicator" to "present key factors from [the Company's] side in this case" because the Company was unable to present its evidence at the mediation session at the date of the mediation conflicted with the "420 Event … one of the busiest days for events in Westend Vancouver" for the Company. He also expresses his interest to submit a Service Canada document that purportedly states that Mr. Armankhah quit.

26. In her response email of same date, the delegate informs Mr. Duchesne that it is not permissible to contact the Adjudicator before the Complaint Hearing but he could submit the Service Canada document as part of his submission at the Hearing of the Complaint.

27. On May 12 and 14, 2017, Mr. Duchesne provided copies of the Employer's documents to the delegate.

28. On May 16, 2017, the delegate sent Mr. Armankhah's documents to the Company by email and asked Mr. Duchesne to review them prior to the Complaint Hearing so that he is familiar with them.

29. On May 24, 2017, Mr. Duchesne emails the delegate stating:

> "I did not get a timeframe until last week for grad dates. We have [sic] reschedule as this week is hectic and my 18-year-old son is Graduating from High school this Thursday and Friday, and we are preparing this whole week for this special occasion. I can prove the schedule if you wish?"

30. On May 25, 2017, the Delegate responds by email asking Mr. Duchesne to complete the Branch's adjournment request form. The form, in part, states in bolded writing:

> **Until advised in writing by the employment Standards Branch, parties must not consider the adjournment request granted and should remain prepared to attend the hearing on the scheduled date. If a party does not appear, the hearing may proceed in their absence.**

31. On the same date, on May 25, 2017, Mr. Duchesne provides the Branch a completed adjournment request form (the "First Adjournment Request"). In the adjournment application form, Mr. Duchesne states that his son is graduating and that this is taking up all of his time from May 25 to June 3, 2017. He attaches an email from Elgin Park Secondary School which indicates that on June 1, 2017, the date for the Hearing, graduates would be required to take part in a commencement rehearsal. The email also indicates that instructions and directions for parents would be sent home with the graduates after the rehearsal.

32. After considering the First Adjournment Request, on May 25, 2017, the delegate denies the request stating that such requests were typically only granted under extraordinary circumstances, such as when factors outside the control of the parties prevent attendance. The Delegate confirms that the Hearing would proceed as scheduled, at 9:00 a.m. on June 1, 2017.

33. On May 30, 2017, Mr. Duchesne emails the Delegate stating that he is appearing in "the Supreme Court of Canada" on June 1, 2017, having had the (court) matter rescheduled due to his son's graduation. He attaches to his email a letter from his lawyer Brahm Martz (the "Second Adjournment Request"). Counsel's letter, also dated May 30, 2017, confirms that Mr. Duchesne is required to testify in a Supreme Court of BC proceeding between 10:00 a.m. and 4:30 p.m. The letter states that it was not possible to adjourn these proceedings and they had been scheduled for this time "since early 2016". On the same date, the Delegate requests Mr. Duchesne to produce supporting documentation from the Supreme Court of B.C.

34. The next day, on May 31, 2017, Mr. Duchesne provides the delegate with a copy of an "Appointment to Examine for Discovery", dated May 25, 2017. This document shows that Mr. Duchesne is a Plaintiff in legal proceeding and he is required to attend the discovery appointment at 10:00 a.m. on June 1, 2017.

35. After considering the Second Adjournment Request, on May 31, 2017, the delegate responds to Mr. Duchesne advising that the request for adjournment is denied for the following reasons:

> 1) The Employment Standards Branch Notice of Mediation dated April 5, 2017 confirmed that the hearing would be taking place on June 1, 2017. Mr. Duchesne therefore had just under two months' notice of the date of the hearing. He raised no objections to the hearing taking place on this date until May 25, 2017, the date of the first adjournment request, which requested an adjournment on the basis that Mr. Duchesne was busy with his son's graduation and did not mention the examination for discovery. The date for the examination for discovery was provided to Mr. Duchesne by fax on May 25, 2017. Steps should have been taken to ensure that the examination for discovery was scheduled for a date other than June 1, 2017, to avoid a clash. No

> evidence has been provided to suggest that Mr. Duchesne took such steps. In addition, there is nothing in the document provided to suggest that Mr. Duchesne, who is the Plaintiff in the action, cannot reschedule the examination for discovery. As the examination for discovery was scheduled after the Employment Standards Branch hearing, Mr. Duchesne should seek first to adjourn the examination for discovery. No evidence has been provided to suggest that he has done so.
>
> 2) Mr. Duchesne did riot raise this issue until 8.23pm on May 30, 2017, when the fax from the Supreme Court was dated May 25, 2017. The Branch therefore received notification of the scheduling clash on the last working day before the hearing. No reasons were provided to account for this delay.
>
> 3) The request failed to propose any new hearing dates within a reasonable timeframe.
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> Adjournments are only granted in extraordinary circumstances. Adjourning complaints without adequate reasons and without any committed timeframe for resolution runs counter to the purposes of the Act. The request is therefore denied. As such, the hearing will proceed as scheduled.

36. On May 31, 2017, Mr. Duchesne replies to the Delegate stating: "Be informed I will be appealing this decision in a higher court of law with my lawyer".

37. On June 1, 2017, the delegate conducted the Complaint Hearing. Mr. Armankhah was in attendance at the Hearing and provided oral evidence. However, the Company and Mr. Duchesne did not attend the Hearing.

38. While I have carefully reviewed the evidence of both parties that was before the delegate at the Hearing and the evidence Mr. Armankhah gave at the Hearing as summarized in the Reasons, I do not find it necessary to reiterate either in great detail here. Instead, I find it is sufficient to note that Mr. Armankhah's position is that he was fired on February 11, 2017, after he refused to accept the Company's reduction in his role from full time salaried manager to a part time hourly employee.

39. On the part of the Company, it is sufficient to note that, in its email to the delegate on March 20, 2017, the Company denies that it terminated the employment of Mr. Armankhah. Instead, the Company argues that it offered Mr. Armankhah a role in the Company with fewer hours when he returns to work after his sick leave. However, when Mr. Armankhah insisted on having a full time management role and did not reply to the Company's offer above, the Company concluded that he quit his employment.

40. As indicated above, at the Hearing, the delegate considered three questions: (i) Is the Release referred to in paragraph 18 above effective? (ii) Is Mr. Armankhah owed regular wages? If so, how much? (iii) Is Mr. Armankhah owed compensation for length of service? If so, how much?

41. With respect to the first question, the delegate notes that section 4 of the *ESA* provides that the requirements of the *ESA* are minimum requirements and cannot be waived. She states the Release which attempts to waive or forfeit Mr. Armankhah's right to bring a claim under the *ESA* is, therefore, inconsistent with the requirements of section 4 and of no effect.

42. With respect to the second question, the delegate states that there is insufficient evidence for her to find that any further regular wages were owing to Mr. Armankhah. Moreover, she states that Mr. Armankhah was paid in excess of what he claimed he should have been paid at other times. Therefore, there is no outstanding regular wages owing to Mr. Armankhah.

43. With respect to the final question, whether Mr. Armankhah was owed compensation for length of service, the delegate refers to section 63 of the *ESA* which establishes a liability on an employer to provide an employee with compensation for length of service upon termination. She notes, however, that subsection 63(3)

discharges the employer from that liability if the employer can show that the employee was given proper written notice of termination or equivalent wages, or a combination of both, or if the employee quit, retired, or was terminated for cause. She then considers the question of whether Mr. Armankhah, as alleged by the Company prior to the Hearing, abandoned or quit his employment. She notes the onus, in this case, is on the Company to establish that Mr. Armankhah quit his employment. She reviews the legal test for establishing when an employee is considered to have quit his employment noting particularly a subjective and an objective element: subjectively, the employee must form an intention to quit, and objectively the employee must carry out an act inconsistent with his continued employment. In concluding that Mr. Armankhah did not quit his employment but the Company terminated it, the delegate reasons as follows:

> There is no dispute that when the Complainant was ready to return to work following his sick leave, he was offered a role with reduced hours and a different pay structure. There is also no dispute that the Complainant communicated clearly that he would not accept a non-managerial role that was not full time. The Complainant states that he believes he was fired when he received an email from Ms. Albert on February 11, 2017 stating "fire!!". Following Ms. Albert's email, the Complainant testified that the next communication he received was a What's App message from Mr. Duchesne asking him to return his keys. The Employer states that it concluded that the Complainant quit after he failed to respond positively to its offer of part time hourly employment.
>
> There must be unmistakable evidence of an employee's intention to quit before the Employer can be relieved of its obligation under section 63 of the Act. The evidence to suggest that the Complainant quit his employment in this case is scant. The Complainant is clear in his communications with the Employer that he does not wish to accept an alternative role, but this does not amount to clear and unequivocal evidence that he intended to quit. Similarly, the Complainant's lack of communication with the Employer following February 11, 2017 is also insufficient to persuade me that he intended to quit
>
> In fact, the Employer attempted to impose a substantial change to the Complainant's terms and conditions by reducing his role both in terms of responsibility and hours. Section 66 of the Act provides that if a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated.
>
> Demoting an employee by removing management responsibilities and reducing his hours are both substantial changes to employment terms. I am satisfied that the Complainant's employment was terminated pursuant to section 66 of the Act and that compensation for length of service is owed pursuant to section 63.

44. Having concluded that Mr. Armankhah's employment was terminated by the Company, the delegate then goes on to conclude that Mr. Armankhah is entitled to two weeks' compensation for length of service, based on his period of employment with the Company and its predecessor. The delegate also awards Mr. Armankhah vacation pay on the award for the length of service and interest on both amounts.

SUBMISSIONS OF THE COMPANY

45. On August 30, 2017, Mr. Duchesne, on behalf of the Company, filed appeal submissions. These submissions are interspersed with copies of the Determination and the Reasons and they are in the form of a rebuttal or a challenge to the delegate's findings of fact contained in the Reasons. I have carefully read the submissions and all supporting documents accompanying them and, for the reasons set out in the next section of this decision, I do not find it necessary to set them out here.

46. However, I do find it necessary, purposeful and relevant to note here that in the preamble of his submissions, Mr. Duchesne contends that the Determination was unjust because it was only based on the evidence of Mr. Armankhah "during the mediation process". He states that fairness dictates that the delegate "review our

new evidence presented" in the appeal and that the Company be afforded an opportunity to be heard "in person".

47. Mr. Duchesne also submits that the Company wanted to participate in the "mediation process" and sought adjournment twice but to no avail. He states that he was unable to participate by telephone previously "due to store responsibilities, short staffed [sic] and events unfortunately falling on those set times and dates." He also submits that it is "incredibly vital in the decision-making" that "in-person adaptation of the events that led to the outcome of both parties" be heard. Essentially, he is arguing that the Company should be allowed a further opportunity to present its evidence which it was unable to previously present.

ANALYSIS

48. Section 112(1) of the *ESA* provides that a person may appeal the determination on the following grounds:

(a) the director erred in law;

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

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

49. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1).

50. As indicated previously, the Company's appeal is based on the "error of law" and "natural justice" grounds in section 112(1)(a) and (b) of the *ESA*. I will address each ground of appeal under separate headings below, starting with the natural justice ground of appeal.

Natural Justice

51. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring the 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 opportunity to respond to the evidence and arguments presented by an adverse party: (See *B.W.I. Business World Incorporated*, BC EST #D050/96)

52. The gist of the Company's argument under the natural justice ground of appeal is that the delegate ought to have granted an adjournment of the Hearing (although in his appeal submissions Mr. Duchesne appears to mistakenly refer to the Hearing as the "mediation process") to permit the Company to present its evidence. In the result, Mr. Duchesne contends, the delegate did not have the benefit of the Company's oral evidence and made her decision only on Mr. Armankhah's evidence at the Hearing. This constitutes a breach of natural justice rights of the Company, he contends. I find Mr. Duchesne and the Company's submissions unpersuasive and disingenuous because the Company was afforded ample notice and opportunity to participate in both the mediation and the Hearing, but failed to participate in either process without any fault

on the part of the delegate or the Director. I think it bears reviewing the opportunities the Company was provided throughout the process leading to the Determination including the notices it was provided of the consequences of not participating, whether in the mediation process or the Hearing.

53. To begin with, I note, in his email of April 4, 2017, to the delegate, after being afforded a choice by the delegate to pick from a set of four different dates to schedule a mediation session, Mr. Duchesne indicated that he preferred April 20, 2017 for a mediation. On April 5, 2017, the delegate emailed both parties confirming the mediation time, date, and location - April 20 at 9:30 a.m. at Jacoombs Road in Richmond, B.C. The Hearing Date, time and location are set out in bold print in the email. Attached to the delegate's email is also the Notice of Mediation Session which reiterated the same message conspicuously at the top of the second page with a direction that if the Complaint is not resolved at mediation, a Complaint Hearing would take place on June 1, 2017, at 9:00 a.m. Therefore, Mr. Duchesne and the Company were both well aware of the Hearing Date of June 1 as early as April 4, 2017.

54. For some unknown reason, on April 11, 2017, Mr. Duchesne sent the delegate an email stating that he was not available on April 13 but he was fine with the originally scheduled date for the mediation on April 20. In her response email of the same date, the delegate confirms to Mr. Duchesne that the mediation is "still currently scheduled for the same original date" - April 20, 2017 - and provides him a conference ID to call-in. Mr. Duchesne does not respond to that email. His next email to the delegate is on April 20, the date of the scheduled mediation session. The email is date and time stamped at 10:03 a.m. on April 20, 2017; about one half hour after the mediation session was scheduled to start. In the email, Mr. Duchesne states he is "not able to make the call today" because "the mediation fell on 420 event downtown". Presumably he is referring to the Vancouver marijuana festival that took place on April 20 in Vancouver. Apparently Mr. Duchesne's pizza store was busy on that day and he was unable to participate in the mediation, notwithstanding that he previously picked the mediation date of April 20 and confirmed his availability.

55. On May 1, 2017, the delegate, by email and registered mail to the attention of Mr. Duchesne and Ms. Albert, sent another reminder of the Hearing Date to the Company in the form of the Notice. As previously indicated, the Notice states "[t]he Adjudicator may make a Determination based on information before them, even if you choose not to participate at the hearing ". The Notice also provides, under the heading "Adjournments", that:

> Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence.

56. On May 3, 2017, Mr. Duchesne sent an email to the delegate requesting the telephone number of the "assigned Adjudicator" to "present key factors from [the Company's] side in this case" since the Company was unable to do this at the mediation session. In the email, Mr. Duchesne does not mention his unavailability to attend at the Hearing on June 1, 2017. Not until May 24, after producing the Company's documents and receiving Mr. Armankhah's documents, Mr. Duchesne, for the first time, advises the delegate that he is unavailable to attend at the Hearing on June 1. He states he only learned of his son's high school graduation "timeframe" the previous week and he requires a whole week to prepare for "this special occasion". The delegate, in response, informs Mr. Duchesne to complete the Branch's adjournment request form which expressly warns applicants in bold print as follows:

> **Until advised in writing by the employment Standards Branch, parties must not consider the adjournment request granted and should remain prepared to attend the hearing on the scheduled date. If a party does not appear, the hearing may proceed in their absence.**

57. Mr. Duchesne complied with the request of the delegate and submitted to the Branch the Company's First Adjournment Request in which he states that his son's graduation was taking up all of his time from May 25 to June 3, 2017. After considering the First Adjournment Request, the delegate denied the request stating that such requests were typically only granted under extraordinary circumstances, such as when factors outside the control of the parties prevent attendance. The Delegate confirmed in the same correspondence to Mr. Duchesne that the Hearing would proceed as scheduled, at 9:00 a.m. on June 1, 2017.

58. On May 30, 2017, Mr. Duchesne made his Second Adjournment Request. He emailed the delegate that he would be appearing in the "Supreme Court of Canada" on the date scheduled for the Hearing and therefore, he was unable to attend at the Hearing. Interestingly, while in his First Adjournment Request Mr. Duchesne could not attend the Hearing on June 1 because he needed a whole week to prepare for his son's graduation, he now says the "Supreme Court rescheduled because of my son's grad from June 02nd to June 01st court hearing all day[sic] ". In support of the Second Adjournment Request, he attaches his lawyer's letter which states that he (Mr. Duchesne) is required to testify in a Supreme Court of BC proceeding, in Vancouver, on June 1, 2017, between 10:00 a.m. and continuing until 4:30 p.m. The letter further notes that it is not possible to adjourn these proceedings as they have been scheduled for this time "since early 2016". The Delegate, in response, requested Mr. Duchesne to provide supporting documentation from the Supreme Court of B.C. Mr. Duchesne obliges by producing an Appointment to Examine for Discovery dated May 25, 2017, showing that he is indeed a Plaintiff in a Supreme Court of B.C. proceeding and required to attend the appointment at 10:00 a.m. on June 1, 2017. I note, while his counsel's letter says that the discovery of Mr. Duchesne was set "since early 2016", the appointment is dated May 25, 2017, which is almost 2 months after Mr. Duchesne received the first notice of the Hearing Date. It would appear that Mr. Duchesne was privy to the Hearing Date at the time his examination for discovery appointment was issued in the Supreme Court of B.C. Mr. Duchesne or his counsel do not provide any evidence indicating what efforts, if any, were made to schedule the examination in the Supreme Court of B.C. proceeding on a different date than the Hearing Date. I find the circumstances and the reasons for both adjournment applications somewhat suspect and the delegate's reasons for rejecting the applications sound and persuasive.

59. I also note that Mr. Duchesne was provided sufficient notice, whether in the adjournment request forms themselves or the emails of the delegate subsequent to filing of the adjournment requests or in the emails rejecting the adjournment request that on denial of the Company's request for an adjournment, the Hearing would proceed as scheduled on June 1, 2017. Therefore, Mr. Duchesne and the Company were aware, throughout the complaint process, and forewarned in unequivocal terms that the Hearing would proceed as scheduled on June 1. I do not find the delegate transgressed in terms of natural justice when she proceeded with the Hearing on the scheduled date after Mr. Duchesne and the Company failed to attend. I also find it was open to the delegate to proceed and make the Determination based on all the information before her, which information included any prehearing submissions and documents of the Company and Mr. Armankhah. In the result, I find the natural justice ground of appeal of the Company to without any merit and dismiss it.

Error of law

60. In *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defined error of law inclusively as follows:

> 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.

61. In this case, based on the evidence before the delegate at the Hearing, I do not find the delegate erred in law within the meaning of error of law in *Gemex, supra*.

62. More particularly, I find the delegate's legal analysis in concluding that the Release is of no force or effect by virtue of section 4 of the *ESA* and her conclusion that Mr. Armankhah did not quit his employment but the Company terminated it amply supported in the evidence that was before the delegate at the Hearing. In the result, I dismiss the Company's error of law ground of appeal.

New Evidence

63. While the Company has not checked of the "new evidence" ground on the Appeal Form, in Mr. Duchesne's submissions the Company appears to be invoking this ground of appeal as he says that he is asking the Tribunal "to review [the Company's] new evidence presented".

64. In *Bruce Davies and others*, *Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03), the Tribunal delineated four conjunctive requirements that must be met before new evidence will be considered in an appeal. More particularly, the appellant must establish that:

(a) 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;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) 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.

65. I find all the evidence the Company and Mr. Duchesne have submitted on appeal was available at the time the delegate adjudicated the Complaint and therefore, fails to qualify as "new evidence" under the first criteria for admitting evidence in an appeal delineated in *Re Merilus Technologies Inc., supra.* I find the Company had sufficient knowledge and opportunity to attend the Hearing but failed to do so and it is not open to the Company to present its case for the first time on appeal.

66. In the circumstances, I find the new evidence of ground of appeal also fails.

67. For all of the above reasons, I find there is no reasonable prospect that this appeal can succeed and I dismiss it pursuant to section 114(1)(f) of the *Act*.

ORDER

68. Pursuant to section 115 of the *Act*, I order the Determination issued on June 22, 2017, is confirmed together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal