

An appeal

- by -

Electronic Online Systems International Inc. carrying on business as  
EOS International (a California corporation)  
("EOS")

- 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.:** 2010A/103

**DATE OF DECISION:** October 5, 2010

## DECISION

### SUBMISSIONS

Gregory Leiser	on behalf of Electronic Online Systems International Inc. carrying on business as EOS International (a California corporation)
Hadi Saadat	on his own behalf
Andres Barker	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 Electronic Online Systems International Inc. carrying on business as EOS International (a California corporation) (“EOS”) of a Determination of a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) issued on June 8, 2010. The Determination ordered EOS, to pay its former employee, Hadi Saadat (“Mr. Saadat”), a total of \$3,205.84, representing compensation for length of service, annual vacation pay (relating to the length of service) and accrued interest on the first two.
2. The Determination also imposed upon EOS an administrative penalty of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for breach of section 63 of the *Act*.
3. EOS appeals the Determination on all three (3) available grounds of appeal under section 112(1) of the *Act*, namely, that the Director erred in law and failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.
4. EOS is seeking the Tribunal to cancel the Determination.
5. Pursuant to section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated in the *Act* (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. I note that EOS is seeking an oral hearing but has not explained why an oral hearing is necessary. 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

6. The issues in this appeal are threefold:
  - (a) Did the Director err in law in making the Determination?
  - (b) Did the Director fail to observe the principles of natural justice in making the Determination?
  - (c) Has evidence become available that was not available at the time the Determination was made?

## FACTS

7. EOS is a California incorporated company that operates a software business in that jurisdiction. EOS engaged Mr. Saadat as a consultant during the period January 2005 to December 2006 and, thereafter, formally employed him as Training Manager in January 2007 until the termination of his employment, without legal cause, on April 27, 2009.
8. On July 14, 2009, pursuant to section 74 of the *Act*, Mr. Saadat lodged a complaint with the Employment Standards Branch (the “Branch”) alleging that EOS contravened the *Act* by failing to pay him regular wages, vacation pay and compensation for length of service.
9. The Delegate, in his investigation of Mr. Saadat’s complaint, identified two (2) issues that required determination. First, whether Mr. Saadat’s complaint was properly within the jurisdiction of the Branch and, second, whether the matter was already determined through the decision of the Labour Commissioner of the State of California (“Labour Commissioner”), as Mr. Saadat had previously lodged a complaint with the Labour Commissioner which was, at the time of his complaint with the Branch, outstanding but subsequently decided. More specifically, the complaint Mr. Saadat filed with the Labour Commissioner pertained to his claims for overtime wages and vacation pay, which claims he also advanced in the complaint he lodged with the Branch.
10. The Delegate requested submissions from both parties, pointing out to both that pursuant to section 76(3)(g) of the *Act*, the Director has the discretion to refuse to accept, review, mediate, investigate or adjudicate a complaint, or postpone doing any of those things, if a court, tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint. At the time that the Delegate requested submissions from both parties, Mr. Saadat’s complaint before the Labour Commissioner had been dismissed on the basis that Mr. Saadat failed to provide evidence of any violation on the part of EOS.
11. The Delegate, after receiving submissions from Mr. Saadat and from Mr. Robert Levy, Counsel in California, on behalf of EOS, exercised his discretion, pursuant to section 76(3)(g) of the *Act*, to stop investigation that portion of Mr. Saadat’s complaint relating to overtime wages and vacation pay as these claims were already decided by the Labour Commissioner. The Delegate, however, continued his investigation of Mr. Saadat’s claim for additional compensation for length of service pursuant to section 63 of the *Act*.
12. Based on his review of the evidence presented by the parties in the form of written submissions and the documents, which constituted the section 112(5) record, the Delegate awarded Mr. Saadat compensation for length of service and annual vacation pay relating to that award. I propose to delineate below the pertinent evidence adduced by the parties and the Delegate’s observations and findings or conclusions of fact that led to his decision.
13. With respect to Mr. Saadat, the Delegate identifies in the Reasons for the Determination the following documents which Mr. Saadat relied upon to argue that during the entire period of his employment with EOS, he was a resident in British Columbia and performed work for EOS from his office in British Columbia: Property tax notices, Notices of assessment from Canada Revenue Agency; U.S.A. income tax return form, tax refund cheques and Statements from US Treasury and State of California, Banking statements and transaction records, BC Hydro invoices, Telus invoices, Medical Services Plan billing notices, travel itineraries showing departures from and arrivals to Vancouver International Airport, BC Driver’s license, letters from EOS to a Free Trade Officer of the U.S. Customs and Border Protection representing EOS’s offer of employment to Mr. Saadat, and several other letters from 2005 to 2007 from EOS referring to Mr. Saadat as being employed with EOS.

14. With respect to EOS, the Delegate notes in the Reasons for the Determination that EOS contends that Mr. Saadat was acting as an independent contractor from January 2005 to December 2006 and only an employee since 2007 until the termination of his employment and therefore not entitled to any further compensation as he was already provided two weeks pay at termination. EOS also argued that Mr. Saadat's employment is outside the jurisdiction of the *Act* and more properly within the jurisdiction of the State of California. In support of this contention, the Delegate notes EOS, *inter alia*, referred to section 10 of Mr. Saadat's employment contract entitled "Consent to Jurisdiction and Governing Law", which purportedly evidences Mr. Saadat submitting to the personal jurisdiction of the Courts of the State of California with respect to any disputes arising out of his employment with EOS and agreeing that the governing law for any disputes is the law of California.
15. The Delegate also notes that EOS argued that Mr. Saadat signed several government forms including the following which show Mr. Saadat representing that he is a California resident: the Notice of Claim and Conference from the Labour Commissioner, a W-4 tax withholding form, U.S. Department of Justice Employment Eligibility Verification Form and a void cheque.
16. With respect to the preliminary issue of jurisdiction over Mr. Saadat's complaint against EOS, the Delegate, referring to the Tribunal's decision in *Can-Achieve Consultants Ltd.*, BC EST # D463/97 (a reconsideration of BC EST # D099/97), reasoned that in order for the *Act* to apply, there must be a sufficient connection between Mr. Saadat's employment and the Province of British Columbia. More specifically, the Delegate noted that the presence must be a real presence of Mr. Saadat within the Province of British Columbia while performing work for EOS.
17. The Delegate then considered Mr. Saadat's flight records demonstrating he departed from and arrived in Vancouver during his travels in the performance of his duties for EOS as well as the latter's letters presented to the Free Trade Officer in 2005 and 2006 in support of Mr. Saadat's application for non-immigrant work status wherein EOS represented Mr. Saadat "will retain his residence in Canada" and concluded, on a balance of probabilities, that Mr. Saadat performed duties for EOS from his office in British Columbia and not from within the State of California.
18. The Delegate does note in the Reasons that while there is some contradictory evidence suggesting that Mr. Saadat may have represented or misrepresented himself in some filings in California that he was a resident of there, that was not an issue for him to resolve. The Delegate also noted that Mr. Saadat frequently performed services for EOS outside of British Columbia but not in California. More particularly, the Delegate noted that Mr. Saadat was required to travel to other provinces in Canada, to other states in the U.S. and other countries in order to perform his employment duties. However, his presence in those other places was "brief and transitory" according to the Delegate and therefore, it was inappropriate to determine any of those jurisdictions as alternative or appropriate forums for Mr. Saadat to lodge his complaint.
19. Having made his findings that Mr. Saadat was a resident of British Columbia when performing his duties for EOS and performed his duties from an office in British Columbia, the Delegate concluded that there was a sufficient connection between Mr. Saadat's employment and British Columbia such that the Director had jurisdiction over his complaint.
20. With respect to the governing forum and choice of law provision in Mr. Saadat's employment contract with EOS, the Delegate reasoned that Mr. Saadat's claim for compensation for length of service is a statutory entitlement under the *Act* and distinct from any contractual entitlement to reasonable notice and, therefore, only enforceable through the administrative structure of the Branch. Thus, any agreement not to pursue such entitlement through the Branch is inconsistent with section 4 of the *Act*, which provides that the minimum requirements of the *Act*

cannot be waived. Therefore the choice of forum and governing law clause in the contract cannot have the effect of preventing or ousting Mr. Saadat's entitlement to the benefits of the *Act*.

21. Having concluded so, the Delegate notes that the Director continues to have discretionary authority under section 76(3) of the *Act* to refuse to investigate Mr. Saadat's complaint, however, the Delegate did not find any basis under subsections (a) to (i) in section 76(3) to apply in this case to cause the Director to refuse to investigate the complaint. In particular, the Delegate noted that this is not a case where the "the dispute that caused the complaint is resolved" or that "Mr. Saadat's actions warrant a finding that his complaint is frivolous, vexatious or trivial or is not made in good faith," as alleged by EOS. As a result, the Delegate concluded that the Director has the jurisdiction to accept and investigate Mr. Saadat's complaint.
22. With respect to the matter of compensation for length of service, the Delegate, after explaining section 63 of the *Act* setting out an employee's entitlement to length of service pay on termination of employment without cause, noted that EOS paid two (2) weeks' pay to Mr. Saadat for the period of the two (2) years he was formally employed with EOS but disputes Mr. Saadat's claim for additional compensation for length of service for the period 2005 and 2006 when he was engaged as a consultant with EOS. With respect to the latter period, the Delegate noted that if Mr. Saadat was properly characterized as an independent contractor and not an employee then he would not be entitled to any further wages, as the *Act* only applies to employees. The Delegate then proceeded to review the definitions of "employee" and "employer" in the *Act* as well the purposes of the *Act* in section 2, and went on to conclude that it was undisputed that Mr. Saadat performed the same functions while working under contract (as a consultant) as he did when he formally became an employee in 2007. More specifically, the Delegate noted there was no change in his duties and the only meaningful change appears to have been his inclusion on the payroll as a salaried employee whereas before he submitted invoices in order to get paid. The Delegate also again referred to the letters by EOS to the Free Trade Officer as supportive of this conclusion as these letters were prepared by EOS during the period in question and EOS represented in the letters that Mr. Saadat would be "employed" with EOS and that his employment was "temporary employment". In the circumstances, and based on the statutory definitions of "employee" and "employer", the Delegate concluded that Mr. Saadat was an employee for the purposes of the *Act* when he performed services under contract in 2005 and 2006. In the result, the Delegate held EOS liable to pay Mr. Saadat an additional two (2) weeks' wages in respect of compensation for length of service and went on to determine that amount, inclusive of 4% vacation pay and interest. The Delegate also imposed an administrative penalty of \$500.00 against EOS for contravention of section 18 of the *Act* for failing to pay all wages owing to Mr. Saadat within 48 hours after the termination of his employment.

## **SUBMISSIONS OF EOS**

23. EOS, through its VP of Finance, Gregory Leiser ("Mr. Leiser"), made written submissions in support of EOS's appeal. In the written submissions, Mr. Leiser summarizes the basis for EOS's appeal as follows:

### **Grounds for Support of Why this Appeal Should Be Allowed**

1. New evidence has been discovered in support of an insufficient connection to British Columbia during the two years (2005 and 2006) that Saadat provided services to EOS pursuant to a consulting agreement.
2. The Delegate of the Director of Employment Standards ("Delegate") reached a factually erroneous conclusion in his interpretation of the facts surrounding Saadat's connection to the Province for purposes of determining jurisdiction, Saadat's status as an employee, and finally length of service liability by EOS to Saadat.

3. The proper jurisdiction for this matter is the Labor Commissioner of the State of California, who previously determined that it had jurisdiction over Saadat's employment claims.
24. In the balance of his written submissions (which I have very carefully read), Mr. Leiser, with very few exceptions, largely reiterates the submissions of EOS's counsel to the Delegate during the investigation of the complaint. In particular, the submissions EOS's counsel made in his correspondences to the Delegate on February 19, 2010, March 22, 2010, and May 24, 2010.
25. As for the purported new evidence, Mr. Leiser attaches to his written submissions a schedule entitled "Saadat Invoice History 2005-2006" (the "Invoice History"). According to Mr. Leiser, the Invoice History shows that 81% of Mr. Saadat's time, in providing services to EOS, was outside the Province of British Columbia and only 19% was in British Columbia. This information, together with a few other observations previously made by EOS's counsel, according to Mr. Leiser, show an insufficient connection between Mr. Saadat's employment and the Province of British Columbia and establish an error on the part of the Director in assuming jurisdiction over Mr. Saadat's complaint.
26. It is important to note that in EOS's final reply, Mr. Leiser explains that the new evidence, the Invoice History, required "hours of time to be located in records storage". He states "substantial additional time" was required to analyse and summarize the information "in a schedule". As to why this was not done previously during the investigation of Mr. Saadat's complaint, Mr. Leiser states "EOS did not believe, based upon the abundance of evidence, that Mr. Saadat's services as an independent contractor would be found to be equivalent to that of an employee by the Director". He also submits that he himself was not employed, nor did he have any contact with EOS, during 2005 to 2006, the material time period in question.
27. In addition to the Invoice History, Mr. Leiser also refers to factors already referred to previously by EOS's counsel against jurisdiction of the Director, including that EOS is a California incorporated company, has its operations in California and "all its offices and employees reside in California". He further submits that EOS does not, and never has, maintained an office in British Columbia, nor did it require Mr. Saadat to maintain an office in British Columbia.
28. With respect to the 19% time Mr. Saadat worked in British Columbia, Mr. Leiser states that Mr. Saadat's services primarily consisted of providing internet training to customers located outside of British Columbia, which training could have been performed from any location in the world with internet access. He also states that Mr. Saadat was also responsible for on-site training and other services which represented only 2.7% of his total time as a consultant. He also notes that Mr. Saadat's decision to carry on on-line internet-based services from British Columbia was not mandated by EOS and it was Mr. Saadat's own decision. This appears to be new submissions, which he or EOS's counsel did not fully make in the investigation of the complaint.
29. In the balance of the written submissions, Mr. Leiser follows the format of the headings in the Determination and challenges specific findings and conclusions of facts made by the Delegate. He does this by both reiterating the arguments advanced by counsel for EOS during the investigation of Mr. Saadat's complaint and also by presenting new arguments based on purported new evidence. I do not intend to reiterate here all submissions that clearly constitute re-argument but only wish to point out those that appear to be new arguments. For instance, based on Mr. Leiser's calculations of hours invoiced by Mr. Saadat during the period 2005 and 2006, Mr. Saadat's hours of work for EOS represented only 47% of his total available time during working hours, and, therefore, Mr. Leiser argues that Mr. Saadat was free to provide services to other customers unrelated to EOS and he may have had other sources of consulting income during this period. This submission is presented with a view

to challenging the Delegate's Determination that Mr. Saadat during 2005 and 2006 was an employee and not an independent contractor with EOS.

30. Further, in his submissions under the heading "Findings and Analysis", based again on the purported new evidence in the form of the Invoice History, Mr. Leiser challenges the Delegate's finding that Mr. Saadat was performing his duties from his office in British Columbia as "quite impossible" as Mr. Saadat performed "81% of his work (real presence) for EOS outside of British Columbia and in many instances at EOS headquarters facility in California". While not much turn on this, I observe that Mr. Leiser submits that 21% of Mr. Saadat's total worked hours were spent providing services for EOS in California, either at EOS headquarters or servicing customers based in California, however, the new evidence in the Invoice History document shows 19% of Mr. Saadat's time was spent outside of British Columbia and in California.
31. Mr. Leiser also attempts to explain the letters to the Free Trade Officer in 2005 and 2006, which the Delegate appears to have relied upon in determining the jurisdiction of the Director over Mr. Saadat's complaint. Mr. Leiser states that the letters "require additional explanation" and goes on to submit:
- 1) The letter of January 4, 2005 offered Saadat employment. Clearly, based on the subsequently signed contractor's agreement, Saadat rejected this offer of employment and Saadat and EOS jointly executed a contractor agreement.
  - 2) The letter of November 17, 2006, almost 2 years later, confirmed the Company's intention to again offer Saadat employment. Saadat finally accepted this employment offer, and became a full-time employee, subject to jurisdiction in California, on January 1, 2007.
  - 3) The March 22, 2007 letter was written when Saadat was already an employee at EOS.
32. Mr. Leiser then proceeds to summarize case law, including the Tribunal's decision in *Can-Achieve Consultants Ltd., supra*, which set out the tests requiring a connection between the employee through a real presence while performing work in the jurisdiction, to argue that Mr. Saadat did not have a sufficient connection with British Columbia when performing work for EOS as he did very little work in British Columbia, according to Mr. Leiser.
33. Mr. Leiser further submits that Mr. Saadat also did not consider his employment to be governed under the *Act* as he first filed his complaint against EOS with the Labour Commissioner of the State of California.
34. Mr. Leiser also refers to the decision in *Re Arland Benjamin Marchant*, BC EST # D233/96, and argues for a similar result. In *Arland*, the Tribunal stated, "(a) a matter of statutory construction, there is a presumption against the extraterritorial application of legislation..." and declined to extend or apply the *Act* where the employee's work was carried out completely outside of the province, in Japan. Mr. Leiser argues for a similar result here based on his contention that Mr. Saadat worked 81% of his hours with EOS outside of the Province of British Columbia. Also in support of the same contention in his final reply, Mr. Leiser repeats the submission of EOS's counsel during the investigation of the complaint, namely, that the Canada Revenue Agency in its ruling dated July 22, 2010, concluded Mr. Saadat's employment was not insurable since his benefits were paid by his California employer.
35. With respect to the natural justice ground in EOS's appeal, while Mr. Leiser's written submissions do not contain anything readily identifiable as supporting this ground of appeal, I note that in EOS's final reply, Mr. Leiser flushes out this ground of appeal. In particular, he states that EOS employed a California legal counsel and did not have the benefit of a Canadian counsel during the investigation of Mr. Saadat's complaint. This is because EOS did not believe that a Canadian counsel was necessary, according to Mr. Leiser. He further submits that with "limited knowledge of Canadian law, procedures and practices of the Director of Employment Standards", EOS "was at a significant disadvantage in opposing the Director...".

36. Mr. Leiser also contends that EOS is a small company and “does not have the recourses that would have provided greater awareness into the likely positions the Director would take”. He also submits that the Director’s opposition to the purported new evidence, namely, the Invoice History EOS submits in its appeal, “flies in the face of the principles of natural justice”.

### **SUBMISSIONS OF THE DIRECTOR**

37. With respect to the error of law ground of appeal of EOS, the Director submits that EOS’s primary dispute is with the Delegate’s finding that the Director had jurisdiction over Mr. Saadat’s employment and to determine his complaint. According to the Director, the Delegate delineated evidence upon which he found jurisdiction over Mr. Saadat’s complaint. The Director argues that the Delegate simply applied the facts to the relevant law in making the Determination and acted with “a view of the facts which could be reasonably entertained” and, therefore, there is no identifiable error in law.
38. The Director further notes that EOS’s appeal is largely predicated on its contention that Mr. Saadat only spent 19% of his total hours worked in British Columbia. According to the Director, while this specific allegation was not put to Mr. Saadat during the investigation of the complaint to allow him to respond, the matter of Mr. Saadat’s presence or lack thereof for work in California was addressed by the Delegate, in the Determination. In particular, the Director notes that the Delegate observed in the Reasons for the Determination that while Mr. Saadat frequently performed services for EOS outside of British Columbia, “he did not generally provide those services in California” but rather travelled to other Canadian provinces, U.S. states and countries to perform his employment duties. His transitory presence in those jurisdictions, according to the Delegate, did not warrant a finding of another more appropriate forum for Mr. Saadat’s complaint.
39. With respect to the natural justice ground of appeal, the Director submits that EOS’s submissions on this ground of appeal “do not reveal any obvious argument”. According to the Director, EOS fully participated in the investigation of the complaint through its counsel and was provided with all evidence and afforded the opportunity to respond to the complaint.
40. With respect to the new evidence ground of appeal, the Director submits that EOS has submitted new evidence in the form of documents and submissions of Mr. Leiser. According to the Director, all documents now purported to be new evidence by EOS could have been presented during the investigation and similarly any submissions of Mr. Leiser (based on his review of the evidence) could have been made during the investigation. In the circumstances, the Director argues that the new evidence ground of appeal should fail and the appeal should be dismissed in its entirety.

### **SUBMISSIONS OF MR. SAADAT**

41. Mr. Saadat’s submissions are very brief. He agrees with the Determination and finds the Director’s submissions in response to EOS’s appeal to be “complete, thorough, accurate and correct and (has) nothing further to add”.

### **ANALYSIS**

42. I propose to analyse each ground of EOS’s appeal taking into consideration the parties submissions under separate headings below starting in the reverse order with the “new evidence” ground of appeal first, the “natural justice” ground of appeal next and finally the “error of law” ground of appeal.

#### ***(i) New Evidence***

43. The purported new evidence in this case is the Invoice History as well as new submissions and arguments of Mr. Leiser based largely on the Invoice History and his explanation of documents previously adduced such as EOS's letters to the Free Trade Officer. The explanation Mr. Leiser gives for adducing the Invoice History for the first time in the appeal of the Determination is that it "was not readily available at the time of the investigation" and that "EOS's current accounting staff was not aware that certain records existed". At the same time he explains that this information was not earlier adduced "because EOS did not believe, based on the abundance of evidence, that Mr. Saadat's services as an independent contractor would be found equivalent to that of an employee by the Director". He also notes that the "new evidence...required hours of time to be located in records storage, and substantial additional time to be analyzed and summarized in a schedule" and cost "significant funds".
44. In *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), BC EST # D171/03, the Tribunal, in deciding whether or not to accept fresh evidence on appeal of a determination, was guided by the test applied in civil courts for admitting fresh evidence on appeal. The Tribunal went on to describe the test as follows:
- (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."
45. The fourfold criterion in the test above are a conjunctive requirement and therefore any party seeking the Tribunal to admit new evidence on appeal of a determination must satisfy each criterion before the Tribunal will admit the new evidence.
46. I find in this case EOS fails on the first of the fourfold criterion in *Re Merilus Technologies, supra*. That is, EOS has not provided any evidence to show that it could not, with the exercise of due diligence, have discovered the materials it subsequently obtained from storage to compile in the schedule as Invoice History and now adduces in the appeal of the Determination. It would appear from Mr. Leiser's submissions that EOS was confident that it had sufficient evidence without the evidence in the Invoice History to successfully defend or respond to Mr. Saadat's complaint and therefore did not make any or sufficient effort to adduce the evidence it now adduces. That does not mean the evidence was unavailable at the time of the investigation. It is simply that EOS took a calculated risk or made a reasoned decision not to pursue the evidence that existed at the time. Clearly the type of evidence compiled in the Invoice History is evidence that previously existed and was capable of being compiled as it was compiled for the Appeal but EOS decided not to do this during the investigation or before the Determination was made.
47. One of the important purposes of the *Act* set out in section 2(d) is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the *Act*]". It would run counter to this very important purpose of the *Act* to allow any party, and in this case EOS, to adduce its evidence piecemeal pending the outcome of the complaint. It is important for the parties to adduce all evidence they wish to rely upon during the investigation of the complaint and at the very latest before the determination is made. For a party, in this case EOS, to hold back any pertinent or relevant evidence and produce it during the appeal for the first time is not only inefficient but also very unfair to the other party, Mr. Saadat in this case.

48. What is also troubling with respect to the purported new evidence in the Invoice History is that the source documents EOS appears to have relied upon in preparing the Invoice History were not adduced during the investigation of the complaint and Mr. Saadat did not have the opportunity to review or challenge them.
49. With respect to the new arguments Mr. Leiser adduces in the appeal submissions based on the purported new evidence contained in the Invoice History, I find the same analysis and conclusion I have reached with respect to my decision to reject the Invoice History as new evidence applies.
50. As for Mr. Leiser's reiteration of the arguments made by EOS's counsel during the investigation on both the issues of jurisdiction of the Director to consider the complaint or the question of Mr. Saadat's status as an employee, I note that the appeal mechanism is not to provide a second opportunity for a party who is dissatisfied with the Director's decision to reargue the matter over again with a view to finding a more sympathetic ear.
51. Lastly, with respect to Mr. Leiser's decision to take an opportunity in the appeal to make further or new submissions adding to the submissions of EOS's counsel previously, whether on issues already addressed by counsel previously such as the letters from EOS to the Free Trade Officer or other new issues not previously addressed, I note the appeal is not an opportunity for a party to make new arguments or embellish arguments previously made during the investigation. If Mr. Leiser wanted to submit new arguments or his perspective on documents adduced in the investigation or respond to the arguments of Mr. Saadat, he should have done so during the investigation and not for the first time during the appeal. I have chosen to say this under the heading "new evidence" here simply because it appears that EOS and Mr. Leiser appear to treat it as new evidence in their submissions.
52. In summary, I do not find EOS has established the new evidence ground of appeal and I reject this ground of appeal.

**(ii) Natural Justice**

53. The Tribunal in *Imperial Limousine Service Ltd.*, BC EST # D014/05, explained 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.
54. In this case, I agree with the Director that EOS has not provided any evidence in support of its allegation that the Director breached the principles of natural justice in making the Determination. There is, in my view, ample evidence in the record adduced by the Director in the appeal, including the correspondence between the Director and counsel for EOS, that the delegate complied with the rules of natural justice and afforded EOS natural justice or procedural rights throughout the investigation leading to the Determination. There is evidence in the section 112(5) record that EOS, from the onset of the investigation of the complaint, was aware of the complaint and availed itself, through its counsel, Mr. Levy, to make written submissions in response. There is, in my view, no evidentiary basis that EOS was denied procedural fairness during the investigation stage or at any other time leading to the Determination.

55. With respect to EOS's argument, under the natural justice ground of appeal, that its employment of California, and not British Columbia, counsel to assist in defending or responding to Mr. Saadat's complaint was somehow prejudicial to its interests, in my view, is baseless and unmeritorious. Natural justice rights do not mandate that parties involved in a dispute or complaint before the Director should be afforded representation by British Columbia legal counsel. Most parties, including employers, involved in a complaint before the Director are unrepresented and that does not mean they are denied procedural fairness. Here EOS decided to engage California counsel and presumably paid the latter to provide representation during the investigation of the complaint. EOS could have, with some effort, employed British Columbia counsel if it felt disadvantaged with California counsel as it now suggests.
56. Further, Mr. Leiser's contentions that EOS had "limited knowledge of Canadian law, procedures and practices of the Director... and was at a significant disadvantage in opposing the Director..." or that EOS did "not have the recourses that would have provided greater awareness into the likely positions the Director would take", are all without any merit and unhelpful to EOS in establishing a breach of natural justice on the part of the Delegate. The record adduced by the Director in this appeal shows correspondence or email exchange between the Delegate and counsel for EOS wherein the Delegate is very clear in identifying the issues in contention between the parties and what his preliminary views were before making the Determination and this afforded EOS and its counsel sufficient opportunity to respond with EOS's position, which counsel did in this case as evidenced by several pieces of correspondence to the Delegate. I also find that there is no evidence that EOS was in any material way more disadvantaged than a BC based company in defending a complaint from an employee before the Director. If there was any aspect of the law and procedure involved in the defence of the complaint that EOS needed clarification on, it certainly could have requested clarification from the Delegate or the Director but there is no evidence of such during the investigation of the complaint.
57. In the circumstances, I find that EOS's natural justice ground of appeal fails.

**(iii) Error of Law**

58. The Tribunal has consistently adopted the following definition 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.
59. EOS's submissions under the error of law ground of appeal may be considered or examined in context of whether the Delegate misapplied an applicable principle of law, misinterpreted a section of the *Act*, acted without any evidence or acted on a view of facts that could not reasonably be entertained. Having said this, I find that there is no evidence of any of the above in the Delegate's Reasons for the Determination. I find that it was open for the Delegate to conclude that the choice of forum and law clause in the employment contract of Mr. Saadat did not oust the jurisdiction of the Director, because section 4 of the *Act* provides that the requirement of the *Act* are minimum requirements and an agreement to waive any of those requirements would have no effect.
60. I also think that it was open, on the evidence before him during the investigation, for the Delegate to conclude there was a sufficient connection between Mr. Saadat's work for EOS and British Columbia. The Delegate, in my view, properly concluded so relying upon the flight records of Mr. Saadat during trips in the performance of

his work for EOS, the letters from EOS to the Free Trade Officer wherein EOS admits that Mr. Saadat would “retain his residence in Canada” during his “employment” with EOS, as well EOS’s own acknowledgment that Mr. Saadat kept an office in British Columbia.

61. Further, I find that it was open to the Delegate, based on his review of the statutory definitions of “employee” and “employer” and the evidence before him to reasonably reach the conclusion that Mr. Saadat was an employee of EOS during the period 2005 and 2006. More specifically, the Delegate, I think, properly relied upon the similarities in the duties and responsibilities of Mr. Saadat’s position as a contractor in 2005 to 2006 and his employment in 2007 until his termination and EOS’s representations in its letters to the Free Trade Officer in 2005 and 2006 that Mr. Saadat would be employed with EOS, to determine that Mr. Saadat was an employee of EOS during the material time in question. While I appreciate that in his “new” submissions in the appeal of the Determination, Mr. Leiser has tried to explain away EOS’s comments in the letters to the Free Trade Officer and has produced the Invoice History based on various source documents not disclosed during the investigation or in the appeal, I have, for reasons previously explained, decided not to allow the Invoice History nor consider the “new” submissions of Mr. Leiser as they do not constitute permissible “new evidence” on appeal under the test in *Re Merilus, supra*. On the evidence that was before the Delegate, I find that there is no basis to conclude that the Delegate either acted on a view of facts that could not be reasonably be entertained or acted without any evidence. In the circumstances, I reject EOS’s error of law ground of appeal as well.
62. As an aside, while I have previously concluded that the Invoice History is not new evidence and cannot be considered in the appeal of the Determination, if the evidence in the Invoice History were accepted on face value (which I would have difficulty with as it is a summary of some source documents of EOS that existed during the investigation of the complaint but which EOS did not produce and Mr. Saadat did not have the benefit of reviewing and challenging during the investigation), at best the evidence would show that Mr. Saadat spent comparable time working for EOS in California as he did in British Columbia during 2005 and 2006. This would not be sufficient in my view for EOS to successfully challenge the Delegate’s conclusion, on the totality of evidence before him during the investigation, that there was a sufficient connection between Mr. Saadat’s employment and British Columbia. I also note that it is not, in my view, an influencing factor in the “sufficient connection” test that Mr. Saadat could have worked from any other jurisdiction and that EOS may have given Mr. Saadat the freedom to work from British Columbia as opposed to required him to work from there. What is more important is that Mr. Saadat worked from British Columbia and EOS acknowledged he had an office in British Columbia, as described by the Delegate in the Determination.

## **ORDER**

63. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued, together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act* since the issuance of the Determination.

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