Employment Standards TRIBUNAL

An appeal

- by -

Patrick Steve Fagan
("Fagan")

- 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.: 2009A/110

DATE OF DECISION: November 3, 2009

DECISION

SUBMISSIONS

Patrick Steve Fagan	on his own behalf
Dave Mehat	on behalf of Nutrition Zone Products Incorporated
William Boyte	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Patrick Steve Fagan ("Fagan") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a determination that was issued by a Delegate of the Director of Employment Standards (the "Director") on July 15, 2009 (the "Determination"). The Determination found that Fagan was an employee of Nutrition Zone Products Incorporated ("Nutrition Zone") and the latter contravened section 58 of the *Act* for failing to pay Fagan annual vacation pay. The Determination ordered Nutrition Zone to pay Fagan a total of $3,229.85 in wages, inclusive of interest pursuant to section 88 of the *Act*.

2. The Determination also levied an administrative penalty of $500.00 against Nutrition Zone pursuant to section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 (the "*Regulation*").

3. Fagan appeals the Determination on the basis of all three available grounds of appeal under section 112(1) of the *Act* as he has checked off on the Appeal Form the "error of law", the "natural justice" as well as the "new evidence" grounds of appeal. However, it should be noted that Fagan's appeal is limited as it only challenges the Determination in relation to his failed claim against Nutrition Zone for severance or termination pay.

4. By way of a remedy, Fagan is seeking the Tribunal to change or vary the Determination in relation to his claim for severance or termination pay. While he does not set out specifically how he wants the Determination with respect to the severance pay changed or varied, it is apparent from the his submissions that he wants the Tribunal to make a finding that his employment was terminated by Nutrition Zone without cause and therefore he is entitled termination pay in lieu of notice under section 63 of the *Act*.

5. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (pursuant to s. 103) and Rule 17 of the *Tribunals Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the reasons for the Determination.

ISSUES

6. 1. Did the Director err in law or breach the principles of natural justice in failing to find that Nutrition Zone terminated Fagan's employment without cause? If so, did the director err in failing to award Fagan severance or termination pay in lieu of notice pursuant to section 63 of the *Act*?

7. 2. Is there new evidence that has 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 with respect to Fagan's claim for severance compensation?

FACTS

8. Nutrition Zone operates a health and fitness sales company and Fagan performed work as its Vancouver Island Sales Representative from September 1, 2002 until February 11, 2009.

9. On February 16, 2009, Fagan, pursuant to section 74 of the *Act*, filed a complaint against Nutrition Zone alleging that the latter contravened the *Act* by failing to pay him vacation pay and compensation for length of service following his termination (the "Complaint").

10. On June 8, 2009, a Delegate of the Director held a hearing of the Complaint (the "Hearing"). Fagan attended at the Hearing on his own behalf and Dave Mehat ("Mehat"), the owner of Nutrition Zone, appeared by telephone on behalf of Nutrition Zone. Nutrition Zone also had in attendance at the Hearing its National Sales Manager, Matt Bomba ("Bomba").

11. The issues at the Hearing were three-fold:

- Was Fagan an employee or an independent contractor?
- If Fagan was an employee, was he entitled to additional vacation pay?
- If Fagan was an employee, was he entitled to compensation for length of service under the *Act*?

12. After hearing from both parties at the Hearing, the Delegate determined that Fagan was an employee and not an independent contractor and that he was owed additional vacation pay, which the Delegate calculated at $3,229.85 inclusive of interest.

13. However, with respect to Fagan's claim for compensation for length of service pursuant to section 63 of the *Act*, the Delegate rejected that claim after finding that Fagan resigned from his employment and was not terminated or deemed terminated under section 66 of the *Act*. Accordingly, the Delegate did not award Fagan compensation for length of service under the *Act*. It is this aspect of the Determination that Fagan is now appealing. Therefore, I do not propose to review in any detail the evidence and arguments of the parties and the findings of facts made by the Delegate in the Determination pertaining to the matters not under appeal, namely, Fagan's status as an employee of Nutrition Zone and his successful claim for vacation pay. My focus will be on those facts and matters in the section 112(5) "record" and the submissions of the parties that are pertinent to the issue under appeal, namely, whether Fagan resigned or was his employment terminated or deemed terminated and if the latter then severance pay is he owed under the *Act*.

14. Having said this, by way of background, Fagan was a Vancouver Island Sales Representative for Nutrition Zone. It was his responsibility to get new accounts and service existing clients for Nutrition Zone products. His duties and responsibilities included in-person visits and telephone calls to various retail outlets on Vancouver Island who sold Nutrition Zone's products. He also performed merchandising and marketing for Nutrition Zone products at various retail stores and organized and coordinated sales displays and samples to assist retailers in promoting the sales of Nutrition Zone's product.

15. At the Hearing, neither party disputed that Fagan's position was a full-time position requiring him to work 8 hours per day and 40 hours per week.

16. With respect to pay, Fagan stated at the Hearing that with the exception of two pay periods in January and February of 2009, he submitted invoices to Nutrition Zone every two weeks since he commenced his employment with Nutrition Zone and the invoices were always for the same bi-weekly amount, which

increased somewhat over the course of his employment with Nutrition Zone. Fagan also noted that while payment of his invoices was occasionally late, Nutrition Zone did regularly pay him for his services.

17. In late 2008 or early 2009, Fagan stated that Nutrition Zone owed him unused vacation time from previous years. Further, having reached his sixth year of employment with Nutrition Zone, Fagan stated that he felt he was entitled to three weeks vacation. When he raised the matter of his vacation entitlement with Nutrition Zone, he states that Mehat told him that he would not be paid for any time "he took off". Fagan states that he carried on numerous discussions with Mehat about his outstanding vacation entitlement which discussions continued in 2009, culminating in his email dated February 10, 2009 to Mehat wherein he indicated to Mehat that he felt Nutrition Zone owed him $4,400.00 for unpaid vacation.

18. While he was involved in negotiating his vacation entitlement with Mehat, Fagan states that Mehat raised the possibility of changing his Vancouver Island position. In particular, Fagan states that in his phone conversations with Mehat, the latter discussed the options of increasing his sales territory to include the Lower Mainland or, alternatively, reduce his hours of work. Fagan states that he advised Mehat that he did not want to work on the Mainland or on a part-time basis.

19. Fagan adduced into evidence at the Hearing, an email he received from Mehat on February 10, 2009, which read:

> SO I HAVE TOLD SUKEY TO GO AHEAD AND LOOK FOR ANOTHER SALES REP IN VANCOUVER…I JUST NEED TO DISCUSS WITH YOU THE VAN ISLAND TERRITORY AND HOW MUCH MONEY/TIME WE WANT TO ALLOCATE TO SERVING THE ACCOUNTS ON THE ISLAND…PERHAPS WE CAN COME TO AN ARRANGEMENT SMILAR TO JEN IN VANCOUVER WHERE IT WILL BE A PART TIME JOB…CALL ME IF YOU CAN LATER TODAY,
>
> THANKS

20. Fagan states that following his receipt of Mehat's email above, on February 11, 2009, he participated in a telephone conversation with Mehat, wherein Mehat told him that his position would be reduced to a part-time one. In response, Fagan states he asked Mehat "are you telling me that effective next Monday I will be a part-time employee?" and Mehat's responded in the affirmative. In response, Fagan states that he informed Mehat that he could not live on part-time hours and felt he had no choice but to resign from his employment, which he did by sending Mehat an email on February 12, 2009, which read in part:

> This is my formal notice informing you of my disappointment upon hearing that my five and a half years of full time employment is now reduced to only a two days a week job. I was sorry to hear from Dave Mehat of his decision to limit my employment to two days a week permanently…
>
> …As this action by Nutrition Zone is deemed a "termination", there is a time line laid out in the *Employment Standards Act* which must be followed for the prompt payment of wages, bonuses, holiday pay, severance pay.

21. In response to Fagan's email above, Mehat, on February 13, 2009, sent the following email to Fagan:

> With mixed emotions, I accept your resignation. Contrary to what is indicated in your email, at no point have I or anyone else at Nutrition Zone given you notice that your position has been changed/reduced.

22. Fagan also submits that after he sent his resignation on February 12, 2009, he received a telephone call from Bomba in which he recounted his conversation with Mehat of February 11, 2009, and advised Bomba that he had no choice but to terminate his relationship with Nutrition Zone as his hours had been substantially reduced and he could not live on reduced hours.

23. Fagan also submitted as evidence in support of his position that Nutrition Zone had made a definitive decision to reduce his hours in or around the time he resigned from his employment a Craigslist advertisement placed by Nutrition Zone dated February 10, 2009. The advertisement in question read in part:

> Outside sports nutrition sales (vancouver and vancouver island)
>
> Canada's Leading Provider of Performance Nutrition Products is seeking outside Sales Representation for greater Vancouver
>
> Location: vancouver and vancouver island

24. Fagan submitted that the Craigslist advertisement of Nutrition Zone was posted one day before his resignation email was sent to Mehat and therefore the advertisement was proof that Nutrition Zone had already made its decision to reduce his hours of work.

25. On the part of Nutrition Zone, Mehat, at the Hearing, submitted that the Vancouver Island territory of Nutrition Zone was losing money and that something needed to be done. As a result, Nutrition Zone began considering the possibility of altering Fagan's Vancouver Island position including the possibility of combining and amalgamating it with a similar position in Vancouver with a single representative to cover the combined larger sales territory. Mehat testified that he and the complainant discussed this option but Fagan informed him that he was not interested in taking on an additional territory or having an expanded territory.

26. With respect to his email of February 10, 2009 to Fagan suggesting the possibility of making Fagan's position a part-time job and inviting Fagan to call him to discuss the matter, Mehat stated that he had not, at the time of the email or subsequently before receiving Fagan's resignation email of February 12, 2009, finalized his decision. Instead, Mehat indicates that after speaking with Fagan on the matter, he called Bomba and asked the latter to brief him on the potential consequences of making changes to Fagan's position and Bomba and Mehat communicated with each other on February 11, 2009 via email. Mehat states he thereafter continued deliberating on the subject when he received, on February 12, 2009, Fagan's resignation letter.

27. With respect to the Craigslist advertisement, Mehat explained that the advertisement showed the geographical location of the ad as "Vancouver and Vancouver Island" which did not agree with the actual content of the advertisement, which stated that the position was "for Greater Vancouver". Mehat submitted that the Craigslist electronic posting form generates the geographical location and that it was either an error by the person who posted the advertisement for Nutrition Zone or an error on the part of Craigslist website in showing the location of the position as Vancouver Island. Mehat further submitted that he only took steps to look for a representative for Nutrition Zone in Vancouver after Fagan refused the idea of an expanded territory that would see Vancouver included as part of his territory.

28. Mehat also referred to his email of February 11, 2009 to Fagan responding to the latter's previous emailed invoice of $4,400.00 to Mehat or Nutrition Zone for vacation pay. In his email response to Fagan, Mehat queries why he is getting a bill of $4,400.00 and advises Fagan that he left him a message the day before "about a Vancouver Island sales rep position" and invites Fagan to finalize the matter when he states "lets get this finalized asap". According to Mehat, this email supports Nutrition Zone's position that no decision had been made regarding Fagan's position, particularly since he asks Fagan "lets get this finalized". This, to

Mehat, is indicative of an on-going dialogue regarding possible changes to Fagan's position and not evidence of a decision having already been made. However, Mehat admits that ultimately he could have reduced Fagan's position to a part-time one, but this decision had not been made when he received Fagan's email on February 12, 2009 resigning from his employment with Nutrition Zone.

29. Bomba, in his testimony at the Hearing, noted that Mehat had contacted him in early February 2009 regarding Fagan's territory and asked him to contact the Ministry of Labour to determine what issues may arise if Nutrition Zone chose to make substantial changes to Fagan's position, including converting it from a full-time to a part-time position. Bomba stated that he investigated this issue and sent an email to Mehat about it on February 11, 2009. However, according to Bomba, at no time during his initial conversation with Mehat or following his email of February 11, 2009, Mehat or anyone else at Nutrition Zone advise him that the Vancouver Island position had been changed to a part-time one. While Bomba admitted that the option of changing Fagan's position to a part-time one had been discussed, he understood that Mehat was still considering his options for how to address the problems with the Vancouver Island territory.

30. Bomba also testified that he learned of Fagan's resignation when he received a copy of Fagan's resignation email on February 12, 2009. Thereafter, he telephoned Fagan to see if "something could be worked out". He recalls Fagan identifying four issues that lead him to resign from his employment with Nutrition Zone, namely: (i) holiday pay and time off issues, (ii) part-time work, (iii) possible expansion of territory to Vancouver; and (iv) outstanding bonus that he had not been paid.

31. In the Reasons for the Determination, the Delegate notes that Fagan did not deny that he resigned from his employment but that he asserted that his resignation resulted from changes made to his employment by Nutrition Zone such that his resignation was a deemed termination of his employment by Nutrition Zone pursuant to section 66 of the *Act*. The Delegate, in considering Fagan's argument, referred to the decision of the Tribunal in *Re Short BCEST #D061/04* which adopted the criteria set out by the Supreme Court of Canada in *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846, with respect to the factors a decision-maker must consider when determining if employer-imposed changes constitute a termination under section 66 of the *Act*. The Tribunal member in *Re Short* summarized the three-fold criterion in *Farber, supra*, as follows:

> – First identify the terms and conditions (both express and implied) of the parties' employment contract;
>
> – Second, determine whether the employer breached one or more terms of that contract by way of a unilateral change; and, if so,
>
> – Third, determine if that breach was "substantial" (s.66) or, in terms of the common law, "fundamental" or "repudiatory".

32. In the case at hand, the Delegate noted that in the first part of the section 66 inquiry under the *Farber* of *Re Short* criteria it is important to note that the parties agreed and that it was a key condition of Fagan's employment that his position was a full-time one and that the triggering event for his resignation was his understanding that his employment would be changed to part-time.

33. With respect to the second part of the section 66 inquiry, namely, whether the employer breached a significant or key condition of the employment by way of the unilateral change, the Delegate noted that this stage of the inquiry required a determination of whether Nutrition Zone made a change in fact to Fagan's position. According to the Delegate, there was not sufficient evidence to conclude Nutrition Zone breached a key condition of the employment contract by making a unilateral change. However, the converse was supported in the evidence, according to the Delegate. In particular, the Delegate noted that while a change to Fagan's position was contemplated by Nutrition Zone, this change had not been made when Fagan, on

February 12, 2009, terminated his employment relationship by resigning. The Delegate arrived at this conclusion based on his review of the contradictory evidence of the parties and his assessment of the credibility and internal consistency of the evidence of the parties based on the criteria and direction set out by the British Columbia Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 352.

34. More specifically, the Delegate specifically noted the testimony of Fagan pertaining to the telephone conversation he had with Mehat of February 11, 2009 wherein Fagan indicated that Mehat advised him that his job was now part-time. Against this testimony, the Delegate weighed Mehat's contradictory testimony under oath that he made no such statement to Fagan and Mehat's February 11, 2009 email to Fagan (before the latter sent his resignation email the next day) stating "lets get this finalized asap". The Delegate found internal consistency with the evidence adduced by Mehat over Fagan's and therefore preferred Mehat's evidence to Fagan's that no change had been made to Fagan's position as at the time of Fagan's resignation email on February 12, 2009.

35. The Delegate also found support for Mehat's version of events in the sworn testimony of Bomba who stated that Mehat never indicated to him in his capacity as National Sales Manager for Nutrition Zone that a final decision on Fagan's position had been made. Additionally, the documentary evidence in the form of an email sent by Bomba to Mehat on February 11, 2009, before Fagan's resignation, provided further support of Mehat's version that Nutrition Zone was continuing to weigh its options regarding the Vancouver Island territory at the time.

36. The Delegate also noted that despite rigorous questioning on cross-examination by Fagan, Bomba did not agree that Fagan told him in their telephone conference on February 12, 2009 that Mehat had made his position a part-time one. While Bomba conceded that Fagan informed him in that telephone conference that he could not live on a part-time salary, he did not recall Fagan telling him that Mehat told him "effective Monday, you are a part-time employee". Bomba maintained in his testimony that no decision had been made on Fagan's position when Fagan resigned by email on February 12, 2009.

37. Furthermore, the Delegate also notes that he rejected Fagan's submissions or arguments pertaining to the Craigslist advertisement of Nutrition Zone that was posted days before Fagan's resignation. The Delegate referred to Mehat's testimony that the advertisement's heading listed "Vancouver and Vancouver Island" was misleading and maybe generated by the Craigslist website whereas the body of the advertisement was clearly advertising a position in Vancouver. According to the Delegate, this was also consistent with the email dated February 10, 2009 to Fagan wherein Mehat informed Fagan, after the latter's refusal to accept an extended sales territory, that he would proceed with a search for another sales representative for Vancouver.

38. In summary, the Delegate went on to conclude that he preferred Mehat's testimony or version of events as it was "more supported by the other evidence" and therefore rejected Fagan's contention that Nutrition Zone made a unilateral change to the conditions of his employment on February 11, 2009 in the telephone conference between Fagan and Mehat. Accordingly, the Delegate concluded that Nutrition Zone did not unilaterally change Fagan's position to part-time at the time Fagan resigned. Therefore, the Delegate found it unnecessary to proceed to the third step in the section 66 inquiry– whether the change was substantial or not. The Delegate concluded that Fagan had resigned from his employment and thus he was not entitled to compensation for length of service under section 63 of the *Act*.

SUBMISSIONS OF FAGAN

39. As previously indicated, in his written submissions, Fagan states that he is appealing the Determination in relation to his severance pay claim, which the Delegate dismissed. Fagan submits that the Delegate did not

address in the Determination his complaint or allegation that Nutrition Zone failed to pay him wages for at least five weeks and this alone "should have entitled (him) to resign with full severance". He also submits that the Delegate, in the Determination, failed to acknowledge Mehat's two emails stating "I want to talk to you about working part-time and I want to finalize it, call me".

40. Fagan is also critical in his submissions of the testimonies of Mehat and Bomba. In the case of Mehat, Fagan states that Mehat's testimony at the Hearing was "incomplete and vague on what conversation took place" (referring presumably to his telephone conversation with Mehat on February 11, 2009).

41. With respect to Bomba, Fagan states that Bomba's testimony was lacking in that Bomba had no knowledge of Mehat's dealings with him until he received Fagan's resignation. According to Fagan, not much weight, if any, should be placed on either Bomba's or Mehat's testimonies.

42. Fagan also submits that he has three new witnesses "to verify what happened that day", referring to the February 11, 2009 telephone conversation between Mehat and Fagan. Fagan lists the three witnesses in and the evidence each would give as follows:

> A) Dave Whalen (Toronto sales manager of a competing sport nutrition company) asking for a job and being told I was now a part time employee [sic]
>
> B) Joy Fagan (from Arizona) angry phone call asking what I should do about being told I was now a part time employee. [sic]
>
> C) The employment standards counter person I took the two emails to ask for advice how to handle the phone call that was coming telling me I was going to be a part time employee. She will testify that if I had taken the part time job I would give up my rights to my severance. When I asked her if I should record the phone call she said that should be not be necessary. [sic]

SUBMISSIONS OF NUTRITION ZONE

43. Mehat, on behalf of Nutrition Zone, makes limited submissions pertaining to the purported new evidence Fagan wants to adduce through Dave Whalen ("Whalen") and his mother, Joy Fagan ("Mrs. Fagan"). He states that he has spoken to neither regarding Fagan's position.

SUBMISSIONS OF THE DIRECTOR

44. The Director submits that Fagan, at the Hearing, stated that all outstanding issues of "back pay" had been addressed and the only outstanding issues at the Hearing were vacation pay and compensation for length of service.

45. The Director further submits that Fagan did not lead evidence or argue at the Hearing that the delay of five weeks in receiving his pay from Nutrition Zone was a substantial change to the terms and conditions of his employment justifying a finding of termination of his employment by Nutrition Zone pursuant to section 66 of the *Act*. Instead, submits the Director, Fagan's argument focused on the purported reduction of his full-time hours of work to part-time as the only substantial change in his employment amounting to a deemed termination of his employment.

46. The Director further submits that it was not the Delegate's responsibility to advise Fagan on how to establish the terms and conditions of his employment had been substantially changed, as that would be tantamount to advocating for Fagan and therefore improper. The Director submits that the Delegate simply considered the

evidence and arguments as presented by the parties at the Hearing and appropriately issued the Determination.

47. With respect to the purported delay in the payment of Fagan's wages by Nutrition Zone, the Director submits that the delay in itself is not determinative of Fagan's entitlement to resign from his employment or severance pay under the *Act*.

48. The Director submits that Fagan testified at the Hearing that from late December 2008 until his resignation in February 2009 he and Nutrition Zone were engaged in on-going negotiations regarding his vacation carryover and entitlement. The Director found this rather inconsistent with Fagan's claim during the same period that the delay of Nutrition Zone in paying him wages constituted a substantial change in the terms and conditions of his employment tantamount to deemed termination. In addition, the Director notes that Fagan testified at the Hearing about Nutrition Zone's past practice of "occasionally" remitting payment for Fagan's invoices late. This evidence, states the Director, precludes a straightforward finding that late payment by Nutrition Zone to Fagan constituted a substantial change to his employment. According to the Director, in light of the evidence of past acceptance of late payment by Fagan together with Fagan's failure to lead any evidence or argument on the late payment issue at the Hearing, "the mere fact that payment was delayed for five weeks was, in itself, not sufficient to demonstrate a substantial change to the terms and conditions of [Fagan's] employment". The Director also submits that to raise the matter of the delayed payment as a substantial change to the terms and conditions of his employment for the first time at the appeal stage is inappropriate.

49. With respect to Fagan's critique of Mehat's and Bomba's evidence or testimonies at the Hearing and the weight placed by the Delegate on their testimonies, the Director submits that Fagan is simply disagreeing with the Director's findings on the evidence, which is not a proper ground of appeal. Moreover, on the evidence, both documentary as well as oral evidence, of Mehat and Bomba, it was available to the Delegate, for reasons of credibility, to prefer the latter's testimonies to Fagan's and that the findings of fact based on credibility should not be lightly disturbed.

50. Finally, with respect to Fagan's intention to call three additional witnesses to verify or support his version of events, the Director submits that Fagan did not call any of these witnesses or reference them in his testimony during the Hearing. According to the Director, Fagan has also failed to provide any evidence to demonstrate that the testimonies of any of these witnesses is important and there is a good reason why these witnesses or their evidence were not presented in the first instance.

ANALYSIS

51. Having reviewed the pertinent facts in the appeal and the submissions of the parties, I propose to examine each ground of appeal of Fagan under separate subheadings below.

(i) Error of Law

52. 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 reasonable be entertained; and
5. adopting a method of assessment which is wrong in principle.

53. Having closely examined both the determination and Fagan's submissions on appeal, I do not find that Fagan has demonstrated any error of law in the Determination. The crux of Fagan's dispute in the appeal is with the delegate's findings of fact in the Determination and specifically with the Delegate's finding that Fagan resigned from his position before Nutrition Zone could affect a change in his position from a full-time job to a part-time one. On a related note, Fagan appears to challenge the director's credibility assessment and preference of the evidence of Nutrition Zone's witnesses over his evidence. In my view, the Delegate properly weighed and assessed the evidence of the parties and the credibility of Fagan and the witnesses of Nutrition Zone and I find no reviewable error in the delegate's decision here, let alone any basis for a finding of an error of law.

(ii) Natural justice

54. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on 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.

55. In the present case, as with the error of law ground of appeal, Fagan has not demonstrated any breach of the principles of natural justice on the part of delegate. There is absolutely no evidence that Fagan was denied procedural fairness during the Hearing or at any other time. He appears to have been afforded full opportunity to present his case including challenge the evidence of Nutrition Zone by cross-examining the latter's witnesses at the Hearing.

56. If Fagan is contending, and I am not quite clear if he is, that the delegate should have considered the five week delay in payment of his wages by Nutrition Zone as amounting to a deemed termination of his employment pursuant to section 66 of the *Act* thereby entitling or qualifying him for termination pay pursuant to section 63, I respectfully reject that argument. It is for Fagan to make that argument at the Hearing of the Complaint and not raise it for the first time at the appeal stage. In my view, the requirement of the Delegate, as part of natural justice principles, to afford procedural fairness to parties involved in an adjudicative proceeding, does not mean that the Delegate on behalf of one or another party must identify arguments and advocate for a party. To require such from a delegate would compromise the neutrality of the Delegate so very important in the proper administration of justice. In this case, I reiterate, it is for Fagan to have identified and advocate his position that the delayed payment of wages was a substantial change in the terms of his employment.

57. Having said this, I find the Director's submissions on this point compelling, particularly in light of the evidence of past acceptance of late payment by Fagan (without any evidence of any issue on his part) together Fagan's failure to lead any evidence on the subject at the Hearing and therefore, I reject Fagan's appeal on the basis of the natural justice ground of appeal as well.

(iii) New Evidence

58. Fagan proposes to adduce "new evidence" through three witnesses, namely, Whalen, Fagan's mother and the unnamed counter person at the Branch he spoke with before he filed the Complaint. The purport of the evidence of these witnesses is to support Fagan's assertion that a decision was already made by Mehat or Nutrition Zone to reduce his full-time position to a part-time one prior to his email of February 12, 2009 to Mehat wherein he conveyed his decision to resign from his employment with Nutrition Zone.

59. The criteria for allowing new evidence on an appeal of a determination is delineated by the Tribunal in *Re: Merilus Technologies Inc.*, B.C. E.S.T. #D171/0 and comprises of the following:

- 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.

60. This Tribunal has indicated time and again that the four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

61. In the present case I am not convinced that Fagan has met the first criterion in *Re Merilus* test. Fagan does not explain why he did not call the witnesses he now wishes to call in his appeal of the Determination previously at the Hearing of his Complaint. The evidence he wishes to adduce through the witnesses in question as well as the witnesses themselves existed before Fagan filed his Complaint and at the time of the Hearing of the Complaint and also before the Determination was made. Therefore, in my view, the evidence Fagan wishes to adduce through his three witnesses 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. Fagan having failed on the first criterion of the *Re Merilus* test, I am not required to and do not need to go any further and subject the purported new evidence of Fagan to the remaining tests in *Re Merilus*. Accordingly, I reject Fagan's appeal on the new evidence ground of appeal as well.

ORDER

62. Pursuant to Section 115 of the *Act*, I order the Determination ER #104-120 dated July 15, 2009 be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal