

An appeal

- by -

Amandeep Singh Bahia
("Mr. Bahia")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2012A/93

DATE OF DECISION: October 17, 2012

DECISION

SUBMISSIONS

Amandeep Singh Bahia	on his own behalf
Pardeep Sharma	on behalf of Abbotsford Taxi Ltd.
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Amandeep Singh Bahia (“Mr. Bahia”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination of the Director of Employment Standards (the “Director”) issued July 11, 2012 (the “Determination”). The Director’s delegate concluded that Mr. Bahia was a contractor and not an employee of Abbotsford Taxi Ltd. (“Abbotsford Taxi”) and, therefore, the *Act* did not apply to him and the amounts he claimed against Abbotsford Taxi were not recoverable under the *Act*.
2. Mr. Bahia appeals the Determination on all available grounds under section 112(1)(a), (b), and (c) of the *Act*. More particularly, Mr. Bahia argues that the delegate erred in law in finding that he was a contractor and not an employee, and also failed to observe the principles of natural justice in making the Determination. Mr. Bahia also argues that there is evidence that has become available that was not available at the time the Determination was being made.
3. By way of a remedy, Mr. Bahia is seeking the Tribunal to cancel the Determination and make an alternate finding that he was an employee of Abbotsford Taxi.
4. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s. 103), and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination (the “Reasons”).

ISSUES

5. Did the delegate err in law in finding that Mr. Bahia was a contractor and not an employee of Abbotsford Taxi?
6. Has Mr. Bahia substantiated the claim that the delegate failed to observe the principles of natural justice in making the Determination?
7. Has Mr. Bahia adduced new evidence that was not available at the time the Determination was being made that would have led the Director to a different conclusion on a material issue?

FACTS AND REASONS FOR THE DETERMINATION

8. Mr. Bahia filed a complaint under section 74 of the *Act* alleging that Abbotsford Taxi, a taxi company, contravened the *Act* by failing to pay regular wages in the amount of \$4,000.00, vacation pay in the amount of

\$300.00, statutory holiday pay in an undetermined amount, overtime in the amount of \$918.00, compensation for length of service in the amount of \$4,000.00 and reimbursement of \$400.00 for some unauthorized deductions by Abbotsford Taxi (the “Complainant”).

9. The Director’s delegate held an oral hearing of the Complaint on March 15, 2012, and concluded, based on all of the parties’ evidence, including Mr. Bahia’s written submissions, that the latter was not an employee of Abbotsford Taxi, but a contractor and, therefore, the *Act* did not apply to him and could not be relied upon to recover his claims against Abbotsford Taxi. In arriving at this conclusion, the delegate relied on the very broad and rather inclusive definitions of “employee” and “employer” in section 1 of the *Act* as a starting point and then went on to consider common law tests employed by the courts in determining whether an employment relationship exists, with particular reference to the Supreme Court of Canada’s decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59.
10. The delegate, in the Reasons, considered factors such as what control, if any, Abbotsford Taxi exerted over Mr. Bahia; who owned the vehicle used by Mr. Bahia; the degree of financial risk taken by Mr. Bahia; and the opportunity of Mr. Bahia to profit from his work. The delegate then summarized her findings of fact, stating:

Both Abbotsford and the Complainant had consistent evidence regarding the short term lease agreement. It was not in dispute that the Complainant paid \$85.00 for the lease and for the gas he used during the 12 hours he had use of the cab. Pursuant to this agreement, after these amounts were paid all money collected for fares could be kept by the Complainant. Mr. Sandhu would drive the cab for the night shift and the Complainant could lease it during the day. Although the Complainant stated the shifts were set by Abbotsford, I take this to mean that the owners decided whether they wished to drive the night shift or the day shift.

The parties both testified the cab was owned, or paid for and maintained, by Ramandeep Sandhu, a shareholder of Abbotsford. The registered owner of the cab was Abbotsford who also held the fleet insurance for the cabs. Furthermore, the parties agreed the Complainant had the use of the cab for a 12 hour period, during which he could pick up fares by flag, queue or through the dispatch provided by Abbotsford.

Abbotsford gave no direction about the method used to pick up fares, as this was something decided by the Complainant.

...The evidence presented at the hearing made it clear that the Complainant was entitled to do what he saw was fit with the cab during the 12 hours he had use of it pursuant to his lease agreement. The Complainant’s witness Mr. Sethi also testified that the drivers on lease agreements could do what they wanted during the lease period.

...

...there were no examples provided where he [the Complainant] received discipline from Abbotsford. I find that given the freedom provided by Abbotsford to run the cab as he saw fit during the lease period that the Complainant was not subject to a degree of control by Abbotsford that is normally present in an employment relationship.

...

The Complainant drove cab owned, insured and maintained by Abbotsford. Furthermore the dispatch was provided by Abbotsford at no additional cost to the Complainant.

However, the Complainant, by virtue of being a lease operator was paying Abbotsford through the primary operator to use this equipment. Therefore, the Complainant was required, before he could make any income, to make an investment in the use of the ‘tools’ needed to perform the work. This is distinctly different from a situation in which the tools are simply provided by an employer for use by an employee.

...

The Complainant operating the cab as a lease operator was engaged in a situation whereby he could either have a profit or loss, depending on how he structured his day.

After ensuring the cost of the lease and the gas has been paid, the Complainant was entitled to keep all other earnings from the 12 hours he had the cab. Abbotsford would collect the fares paid on accounts or by credit or debit, but cash fares went directly into the hands of the Complainant.

The fact that the Complainant had control over where he drove the cab or picked up fares allowed him an opportunity to either profit or [suffer a] loss from the lease arrangement.

11. The delegate then went on to review trip sheets produced at the hearing, showing fares Mr. Bahia collected while operating his vehicle under the lease arrangement. Based on these trip sheets, the delegate observed that on some days Mr. Bahia recorded greater or more fares than on other days and, therefore, was in a position to make greater profits after deduction of his lease and gas costs on those days. The delegate also observed that some days Mr. Bahia stood in a position to suffer a loss.
12. Based on the “totality of the evidence regarding the lack of control, the use of equipment at a cost to the Complainant, the risk of loss, and chance of profit”, the delegate concluded that Mr. Bahia’s relationship with Abbotsford Taxi was one of a “contractual nature whereby the Complainant paid for the use of the taxi and in exchange was entitled to keep all the proceeds from a shift”.

SUBMISSIONS OF MR. BAHIA

13. Mr. Bahia, in his lengthy written submissions disputes the findings of fact of the delegate, which led the latter to conclude that Mr. Bahia was not in an employment relationship with Abbotsford Taxi but in a contractor relationship. While I have reviewed Mr. Bahia’s complete submissions, I do not find it necessary to reiterate all of them here as most of the submissions are in the nature of a re-argument or a dispute with the delegate’s findings of fact. I will, however, refer to some of his submissions that demonstrate this. For instance, Mr. Bahia reiterates that he did not have a written lease agreement with Abbotsford Taxi and that he did not have any guarantee of a car to drive on each shift. He also states that he was “not responsible for any damage, fuel and cleanliness of the cab” or “any infractions and parking tickets” while operating a cab. It is noteworthy here that, at the hearing, in the Reasons, the delegate notes that Mr. Bahia admitted that he paid for fuel charges.
14. He also reiterates that Abbotsford Taxi hired him to drive a cab and he was not allowed to set his own hours of work. He states, “I was subject to discipline, suspension and dismissal”. However, as in the hearing of the Complaint, he did not provide any examples of personally being disciplined or suspended. Instead, he now produces in the appeal, what is purportedly a written statement of a former driver for Abbotsford Taxi, Raj Sethi (“Mr. Sethi”), who he says was fired for taking a “flag on street”. Curiously, the statement from Mr. Sethi appears to be in the same font as Mr. Bahia’s written submissions and in similar writing style. As in Mr. Bahia’s own written submissions, Mr. Sethi states in identical language, in paragraph 2, “I was subject to discipline, suspension and dismissal”. There are a few more examples of identical language in the written submissions of Mr. Bahia and the written statement of Mr. Sethi.
15. I also note that both Mr. Bahia, in his written submissions, and Mr. Sethi, in his written statement, discuss Mr. Sethi’s settlement of his complaint against Abbotsford Taxi under the *Act* which, for reasons I set out under the heading Analysis below, I do not need to reiterate here.
16. Mr. Sethi also goes on to corroborate Mr. Bahia’s submissions on the practice and procedures employed by Abbotsford Taxi in its operations which also I do not find necessary to reiterate here for the reasons I set out under the heading Analysis below.

17. I also note that both Mr. Bahia and Mr. Sethi, again in identical language in their written submissions and statements respectively, note that Abbotsford Taxi maintains and can “provide detailed sheets from a Piccolo (Dispatch Software Company) which will provide details like, time, date, dispatched or flag pickup time, drop off time, start of shift, end of shift, location, messages, suspensions, disciplined action, etc. The contact name and number for Piccolo is Jones and 604-***-**** respectively.”
18. Mr. Bahia is also requesting the Tribunal to order Abbotsford Taxi to now provide detailed dispatch system printouts for all his shifts and further requests the Tribunal to accept this purported “new evidence” and “new witnesses” at the hearing. He states that Mr. Sethi was unavailable at the original hearing as he was out of the country at the time. Mr. Sethi, in his written statement, also states that he was unable to attend at the hearing of Mr. Bahia’s Complaint in March 2012 as he was in India.
19. Mr. Bahia has also produced in his appeal some undated screenshots of a message he states he received from dispatch of Abbotsford Taxi reminding each car driver to provide support letters regarding taxi plates, although he does not really explain the relevance of this document. He does point out that the message was sent to him and other drivers on “02/11/2011” but does not explain why he did not produce the screenshots previously at the hearing of his Complaint.
20. He also produces a page from the Taxi Host Program of the Justice Institute of BC, which states that the *Act* covers taxi operators, whether one operates on a commission basis or as a lease operator.

SUBMISSIONS OF ABBOTSFORD TAXI

21. While Abbotsford Taxi, in two (2) emails dated September 11, 2012, requested an additional two (2) weeks to file its reply to Mr. Bahia’s appeal because it wanted to consult its counsel, Abbotsford Taxi appears to have decided otherwise and filed its reply a couple of days later on September 14, 2012. The reply is filed by Pardeep Sharma (“Mr. Sharma”), Abbotsford Taxi’s Office Manager.
22. Mr. Sharma, in his reply, suggests that Mr. Bahia’s appeal is frivolous. He also states that Mr. Bahia’s evidence is inconsistent in that the latter is saying, on the one hand, that he had a daily lease, and on the other hand, he is claiming that he was an employee without any guarantee of work. Mr. Sharma also denies that Mr. Bahia’s arrangement was terminated with Abbotsford Taxi. He states that Mr. Bahia was offered another cab by Gurbinder Boparai (“Mr. Boparai”), one of several directors of Abbotsford Taxi, but Mr. Bahia refused, as he wanted to drive a cab for another company where some of his other friends worked.
23. Mr. Sharma also indicates that, like other taxi companies, Abbotsford Taxi has two (2) shifts of 12 hours. I presume this is in relation to Mr. Bahia’s contention that Abbotsford Taxi had shift work and he was told or directed which shift he could work.
24. Mr. Sharma then raises the question of how Mr. Bahia files his taxes, whether as an employee or as a taxi-lease operator, and if he claims expenses or not. I do not find this submission of Mr. Sharma particularly helpful.

SUBMISSIONS OF THE DIRECTOR

25. The Director submits that Mr. Bahia has not provided any evidence to support his allegation that the Director erred in law in making the Determination. The Director submits that Mr. Bahia’s submissions with respect to the error of law ground of appeal are merely in the nature of a re-argument of the merits of the Complaint and Mr. Bahia is simply asking the Tribunal to come to a different conclusion. According to the

Director, the delegate dealt with the arguments and submissions of Mr. Bahia in his appeal in the Determination previously, and that there is no error of law in the Determination.

26. With respect to the natural justice ground of appeal, the Director states that Mr. Bahia has not adduced any evidence to support this ground of appeal either. The Director states that Mr. Bahia was allowed to call his witnesses at the hearing and was afforded a full opportunity to provide evidence to support his Complaint and to cross-examine Abbotsford Taxi's witnesses.
27. With respect to the new evidence ground of appeal, the Director notes that Mr. Bahia has raised several items or evidence previously not raised or provided at the hearing of his Complaint. First, with respect to the written statement of Mr. Sethi, the Director notes that Mr. Sethi had lodged a complaint against Abbotsford Taxi that was subsequently withdrawn after the parties reached a resolution. The Director states that Mr. Bahia did not offer any explanation as to why the evidence of Mr. Sethi is critical to his case and he did not make any attempt from the end of November 2011 to the date of the hearing of his Complaint in March 2012 to seek an adjournment if he wanted to have Mr. Sethi provide evidence at the hearing. In any event, the Director argues that the evidence of Mr. Sethi is irrelevant, as it has no application to the matter in dispute in Mr. Bahia's appeal.
28. With respect to the screenshots showing messages from the dispatch of Abbotsford Taxi, the Director states that there is no date on these screenshots and no explanation of why these documents were not previously produced at the hearing, although they appear to have been in existence at the time.
29. With respect to the request of Mr. Bahia for dispatch sheets from Piccolo, the Director states that Mr. Bahia neither requested this information be provided at the hearing, nor has he provided any explanation as to why it was not requested at that time. It is the sort of information that would have been available at the time of the hearing, according to the Director.
30. Similarly, with respect to the "receipt" purportedly evidencing settlement payment by Abbotsford Taxi to Mr. Sethi in relation to Mr. Sethi's claim, which Mr. Bahia produces in his appeal, the Director argues that this receipt would have been available at the time of the hearing, and Mr. Bahia has offered no explanation as to why it was not produced then.
31. With respect to Mr. Bahia's request to the Tribunal to order Abbotsford Taxi to provide detailed dispatch system printouts for Mr. Bahia's shifts and his request that the Tribunal accept this as "new evidence" and also accept "new witnesses", the Director again argues that Mr. Bahia does not provide any explanation as to why he did not request the purported "new evidence" at the original hearing, as it was available at the time of the hearing. As for the "new witnesses", the Director submits that Mr. Bahia has not submitted any evidence of Mr. Sethi that might be of assistance, and Mr. Bahia did not raise any concerns at the time of the hearing that Mr. Sethi was not available or that his evidence was necessary to his case. In any event, the Director argues that the resolution Mr. Sethi reached in his own matter on a "without prejudice basis" with Abbotsford Taxi is irrelevant to Mr. Bahia's appeal.
32. With respect to the textbook page from the Taxi Host Program from the Justice Institute of BC, the Director argues that Mr. Bahia has provided no evidence as to how this document, that is used by a third party for instructional purposes, should govern, or fetter, a delegate's decision-making in this case.
33. In conclusion, the Director submits that the evidence Mr. Bahia is attempting to introduce in his appeal is not new evidence, but is an attempt to simply "buttress his arguments raised at the hearing" and, in any event, it does not meet the criteria set by the Tribunal for admitting new evidence.

34. In the circumstances, the Director submits that Mr. Bahia's appeal should be dismissed, as it is no more than an attempt "to re-argue his position as he disagrees with the Determination".

ANALYSIS

35. Section 112 of the *Act* delineates three (3) grounds upon which an individual may appeal a determination. It provides:

- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the Director erred in law;
 - (b) the Director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.

36. In this case, Mr. Bahia has appealed the Determination on the basis of all three (3) grounds of appeal, and I propose to address each of them under the descriptive headings below.

(i) Error of Law

37. The often-quoted decision of the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.), describes the following elements as constituting an error of law:

- (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 reasonably be entertained; and
- (5) Exercising discretion in a fashion that is wrong in principle.

38. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law as expounded by the Court of Appeal in *Gemex, supra*, should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. The Tribunal in *Britco, supra*, also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.

39. The Tribunal has also indicated, time and time again, that it does not have jurisdiction over questions of fact (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re: Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05) unless, of course, the matter involves errors on findings of fact which may amount to an error of law. In *Re: Funk*, BC EST # D195/04, the Tribunal expounded on the latter point stating that the appellant would have to show that the fact finder made a "palpable and over-riding error" or that the finding of fact was "clearly wrong" to establish error of law.

40. It should be noted the Tribunal is generally reluctant to substitute a delegate's findings of facts even if it is inclined to reach a different conclusion on the evidence. Having said this, on the relevant or applicable tests

for determining an error of law delineated in *Gemex, supra*, or in the Tribunal's decisions in *Re: Britco, supra*, or *Re: Funk, supra*, I am not persuaded that the delegate made a palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be entertained. To the contrary, I find that the delegate's findings of fact, particularly as they relate to the determination of Mr. Bahia's relationship with Abbotsford Taxi, to be based on a view of evidence that could reasonably be entertained. More specifically, I find that the delegate properly considered the definitions of "employee" and "employer" in the *Act*, as well as the applicable common law tests governing the determination of a relationship as one of employment or contractor. The delegate, in so doing, highlighted the following persuasive elements that led her to conclude that Mr. Bahia was not in an employment relationship with Abbotsford Taxi:

- Mr. Bahia and Abbotsford Taxi were involved in a lease agreement.
- Pursuant to the lease agreement, Mr. Bahia paid Abbotsford \$85.00 for the lease of the cab for a period of 12 hours and further paid for the gas charges.
- Pursuant to the lease, after the lease amounts and gas were paid to Abbotsford Taxi, Mr. Bahia was entitled to all monies he collected for fares.
- The cab Mr. Bahia drove was owned and maintained by Mr. Sandhu, a director and shareholder of Abbotsford Taxi and Abbotsford Taxi insured it.
- Mr. Sandhu would drive the cab for the night shift and Mr. Bahia was allowed to lease it during the day.
- During his shift, Mr. Bahia had the use of the cab for a 12-hour period during which he could pick up fares by flag queue or through dispatch provided by Abbotsford Taxi for which there was no additional charge.
- Abbotsford Taxi gave no direction to Mr. Bahia about the method for picking up fares as this was something decided by Mr. Bahia. Mr. Bahia had control over where he drove the cab or picked up fares.
- There were no examples of any discipline meted out by Abbotsford Taxi to Mr. Bahia or other drivers.
- Based on the trip sheets, there were days when Mr. Bahia generated higher fares than other days and on those days he stood to make more profit than other days. On some days, he may have been in a loss situation.
- Abbotsford Taxi held the business licence and all required permits.
- WorkSafe BC did not cover the drivers because they were not on Abbotsford Taxi's's payroll.
- Abbotsford would collect the fares paid to Mr. Bahia on accounts or by credit or debit methods, but cash fares went directly to Mr. Bahia.
- Any fares paid on accounts or by credit or debit, after ensuring the cost of the lease and the gas had been paid to Abbotsford taxi, Mr. Bahia received those earnings from Abbotsford.

41. In the circumstances, I find that Mr. Bahia has failed to discharge the burden on him to establish that the delegate erred in law in making the Determination.

42. Further, in dismissing Mr. Bahia's error of law ground of appeal, I find noteworthy and persuasive the decision of the Supreme Court of Canada in *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R. 761. This case arose out of a determination by the Alberta Board of Industrial Relations that an employee-

employer relationship existed between certain taxi drivers and a taxi company. The Board reached this determination notwithstanding the fact that the drivers did not receive wages from the taxi company but, instead, received money from passengers, a portion of which they paid to the taxi company for the use of the company's cars and access to certain of the company's facilities. On appeal to the Alberta Court of Appeal, the latter dismissed the company's appeal. On further appeal to the Supreme Court of Canada, the latter allowed the company's appeal, concluding that the relationship between the company and the taxi drivers was not one of employer-employee, for the following reasons:

The company pays for the Edmonton taxi licences on the rented vehicles and automobile insurance is paid by and in the name of the company. On analysis it will be seen that the payments made by the company are largely if not entirely provided towards the protection of its own property while it is leased to the drivers. The provision of registration and licence plates and the payment of licence fees is an obligation of the owner rather than the lessees of the vehicles and the expenses for maintenance of the vehicles, apart from the provisions of gasoline, is clearly in the interest of the owner. It is true that an examination of the agreed facts discloses that the company pays unemployment insurance contributions for each driver, but this can hardly be said to be equivalent to 'wages'.

As I take the view that no wages flow from the employer-owner to the lessee driver, I cannot find that the relationship of employer and employee existed here within the meaning of the statute.

43. It should be noted that in *Yellow Cab, supra*, the decision involved interpretation of provisions of the Alberta *Labour Act*, R.S.A. 1973, c. 33, where there is a statutory definition of "employee" as meaning "a person employed by an employer to do work or provide services of any nature who is in receipt of or entitled to wages", whereas the British Columbia statute contains an inclusive definition that defines employee, *inter alia*, as "a person...receiving or entitled to wages for work performed for another". Notwithstanding, there are numerous relevant factual similarities in *Yellow Cab, supra*, to this case, including the following material factors in *Yellow Cab, supra*:

- The drivers drive a company-owned car that is rented from the company on a daily or weekly basis;
- The company applies for and provides the Alberta and licence plate;
- The company applies for and provides the City of Edmonton Taxi Licence;
- The company pays for both of the above-mentioned licences;
- Automobile insurance is paid by and in the name of the company;
- The cars have the company colours painted on them;
- There is little supervision necessary over the drivers;
- Charge slips for customers who paid by credit cards bore the company's name;
- The company was responsible for collection of all charges; and
- The company paid for all expenses excluding gas, but including oil and maintenance of automobile;

44. In both *Yellow Cab, supra*, and this case, the drivers stood to make a profit or suffer a loss depending on the number of fares they picked up as they paid a set amount to the company for each day (or in the case of *Yellow Cab, supra*, on a weekly basis which was an option available to the drivers).

(ii) Natural Justice

45. Mr. Bahia has also advanced the natural justice ground of appeal. Natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision-maker.
46. Having reviewed Mr. Bahia's written submissions, I am in agreement with the Director and find that Mr. Bahia has not discharged the onus upon him to show a breach of natural justice. He clearly participated in the Complaint process fully, including the hearing of his Complaint against Abbotsford Taxi. Therefore, I dismiss the natural justice ground of appeal.

(iii) New Evidence

47. With respect to Mr. Bahia's new evidence ground of appeal, while section 112(1)(c) of the *Act* provides that a person may appeal a determination on the ground that evidence has become available that was not available at the time the determination was being made, this section is not intended to allow a person who is dissatisfied with the result of a determination to simply seek out more evidence to supplement or buttress what was already provided to, or acquired by, the delegate during the complaint process or at the hearing of the complaint, if that evidence could have been provided to the delegate before the determination was made. The main aspect of this ground of appeal is that fresh evidence was not available at the time the determination was made.
48. The test governing the new evidence ground of appeal is delineated in the Tribunal's decision in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this decision, the Tribunal, faced with the issue of whether to accept fresh evidence on appeal, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a fourfold test as follows:
- (i) 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;
 - (ii) The evidence must be relevant to a material issue arising from the complaint;
 - (iii) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (iv) 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.
49. The fourfold criteria above are conjunctive and, therefore, the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will accept the purported new evidence and consider it on appeal.
50. Having said this, in this case, one (1) of the pieces of purported new evidence Mr. Bahia presents is Mr. Sethi's written statement which refers to, *inter alia*, a settlement he reached with Abbotsford Taxi pertaining to his dispute with Abbotsford Taxi. Mr. Sethi also appears to corroborate some of Mr. Bahia's evidence at the hearing and in the written appeal regarding the operations of Abbotsford Taxi. While I find it very curious that Mr. Sethi's written statement contains some identical statements or language found in the written appeal submissions of Mr. Bahia, and stylistically both appear to be written by the same person, I need not consider this issue as I find that this evidence fails to pass the first criterion in the *Re: Merilus*

Technologies test. In particular, the purported new evidence of Mr. Sethi existed at the time of the hearing and before the Determination was made and I agree with the Director that if Mr. Sethi's evidence was material and critical to Mr. Bahia's case, Mr. Bahia should have conveyed this to the delegate and, perhaps, sought an adjournment of the hearing. However, there is no evidence that Mr. Bahia mentioned Mr. Sethi's evidence or attempted to obtain an adjournment of the hearing to a more convenient date to allow Mr. Sethi's attendance. I also note there is no evidence of how long Mr. Sethi was away in India. If it was a matter of a few weeks, as opposed to a few months, Mr. Bahia could likely have obtained an adjournment of the hearing without too much difficulty. Alternatively, there could have been other arrangements made to obtain Mr. Sethi's evidence during the hearing, had Mr. Bahia mentioned his intention to call Mr. Sethi as a witness to the delegate.

51. Having determined Mr. Sethi's new evidence does not qualify under the first criterion of the *Merilus Technologies* test for adducing new evidence on appeal, I am not required to review the said evidence in context of the balance of the criteria. Notwithstanding, I find that Mr. Sethi's evidence would fail under the other criteria as well. For instance, the similarity stylistically between the written appeal submissions of Mr. Bahia and the written statement of Mr. Sethi, as well as the discovery of a few instances of identical language in both, raises the issue of credibility for me with respect to whether the written statement of Mr. Sethi represents his own evidence or that of Mr. Bahia. I am also not persuaded that the evidence of Mr. Sethi, particularly relating to his settlement with Abbotsford Taxi, is relevant to a material issue arising in Mr. Bahia's case. Further, I am also not convinced that Mr. Sethi's evidence is of a high potential probative value in the sense that, if believed, it could on its own, or when considered with the other evidence Mr. Bahia has produced, have led the Director to a different conclusion on the material issue of the status of Mr. Bahia vis-à-vis Abbotsford Taxi.
52. The second piece of purported new evidence is the screenshots of messages Mr. Bahia indicates came to him from Abbotsford Taxi's dispatch office on "02/11/2011" directing the drivers to provide 20 support letters from customers regarding the new taxi plate or there would be a fine from management. While the screenshots of the messages do not contain the date the messages were sent, if the date provided by Mr. Bahia is February 11, 2011, or even November 2, 2011, then they existed at the time of the hearing and before the Determination was made, and they should have been produced then, but were not. Mr. Bahia does not explain why they were not produced earlier. He also does not explain the relevance of these screenshots. Therefore, the screenshots do not qualify as new evidence, in my view, based on the *Merilus Technologies* criteria.
53. With respect to Mr. Bahia's request to the Tribunal to order Abbotsford Taxi to produce detailed sheets from the dispatch software company, Piccolo, showing information such as his pick-up time, drop-off time, start time, end time, location and so on, I find that the time for Mr. Bahia to make this request is long past. He should have made the request at the hearing of his Complaint or earlier, and not after the Determination. Mr. Bahia does not explain why he failed to make such request previously. I note that 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*]". In my view, it would run counter to this important purpose of the *Act* to allow Mr. Bahia's request and order production of these records at the appeal stage.
54. Third, I note that Mr. Bahia is asking the Tribunal to accept "new witnesses at the hearing". It is not clear to me if there are any witnesses other than Mr. Sethi whose statement Mr. Bahia has provided and which I have rejected as new evidence. Whether or not there are new witnesses, including Mr. Sethi, at this stage, Mr. Bahia appears to be of the view that the Tribunal may be in a position to hold or direct a re-hearing. It is important to note that the parties should adduce all evidence upon which they intend to rely during the investigation of the Complaint and, at the very latest, before the determination is made. For a party, in this case, Mr. Bahia, to hold back any pertinent or relevant evidence and only produce it during the appeal for the

first time, is both inefficient and unfair to the other party, in this case, Abbotsford Taxi. It is also inefficient, unfair and contrary to the purpose set out in section 2(d) of the *Act* to allow the evidence of Mr. Sethi on appeal when Mr. Bahia could have, with little effort, applied for an adjournment of the hearing until Mr. Sethi was back from his trip and his evidence could have been presented to the delegate at the hearing more fairly and efficiently. I agree with the Director that Mr. Bahia, in this appeal, is simply seeking to re-argue his Complaint and to buttress his evidence previously adduced with a view to obtaining a different conclusion this time. This is not the purpose of an appeal under the *Act*.

55. Lastly, I note Mr. Bahia has produced a copy of a page from the Justice Institute of BC's Taxi Host Program, which states that an individual driving a taxi on a commission basis or as a lease operator is covered under the *Act*. In my view, not only is the document in question not qualify as new evidence under the *Merilus Technologies* test, it is irrelevant. The document and the views in that document with respect to the applicability of the *Act* to taxi operators is neither determinative nor persuasive in this case, and does not fetter the decision-making powers and authority of the Director or her delegate under the *Act*.

56. Based on the foregoing, I find that Mr. Bahia has failed to establish any basis to successfully appeal the Determination.

ORDER

57. Pursuant to section 115 of the *Act*, I order that the Determination, issued on July 11, 2012, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal