Employment Standards TRIBUNAL

An appeal

- by -

D-Tech Muffler and Auto Centre Ltd.
("D-Tech")

- 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.: 2006A/119

DATE OF DECISION: December 6, 2006

DECISION

SUBMISSIONS

Diosdado Delarosa	on behalf of D-Tech Muffler and Auto Centre Ltd.
Ling Zhuang	on his own behalf
Amanda Welch	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by D-Tech Muffler and Auto Centre Ltd. ("D-Tech") under Section 112 of the *Employment Standards Act* ("*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued September 7, 2006 (the "Determination").

2. Mr. Ling Zhuang ("Zhuang") filed a complaint pursuant to Section 74 of the *Act* alleging that his former employer, D-Tech, an auto repair business, failed to pay him regular wages, overtime wages, annual vacation pay and statutory holiday pay (the "Complaint").

3. The Director's delegate held an oral hearing into Zhuang's Complaint on May 4, 2006. Zhuang appeared on his own behalf, and Mr. Desiderio Reyes ("Reyes"), a co-owner of D-Tech, represented D-Tech.

4. The delegate determined that Zhuang was an "Employee" within the meaning of the *Act* as he was "being trained for D-Tech's business and was performing work normally performed by an employee". The delegate also concluded that Zhuang's "labour" for D-Tech qualified as "work" within the meaning of the *Act* and rejected D-Tech's assertion that the *Act* did not apply to Zhuang because he was an apprentice under the now defunct *Apprenticeship Act* (which incidentally was repealed in 1997 and replaced by the *Industry Training and Apprenticeship Act*, which also was repealed in 2003 and thus not in existence when Zhuang was in the employ of D-Tech).

5. The delegate further determined that D-Tech failed to pay Zhuang all wages earned by Zhuang in and during the period November 16 to 30, 2005 in contravention of Section 17 of the *Act*. The delegate also determined that D-Tech failed to pay Zhuang all wages owing to him within six days after he quit his job in contravention of section 18 of the *Act*. The delegate also determined that D-Tech failed to pay Zhuang overtime pay, statutory holiday pay, and vacation pay in contravention of Sections 40, 46 and 58 of the *Act* respectively.

6. The delegate also found that D-Tech contravened Sections 27 and 28 of the *Act* in failing to provide Zhuang a written wage statement on every payday and maintaining records of Zhuang's wage rate, hours of work and gross and net wages for each pay period. The delegate concluded that Zhuang was entitled to wages and interest in the total amount of $3,187.28. The delegate also imposed a $500.00 penalty for each of the six contraventions of the *Act*, for a total of $3,000.00, pursuant to Section 29(1) of the Employment Standards Regulations.

7. D-Tech is now seeking a cancellation of the Determination on the grounds that the delegate failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

Oral hearing

8. D-Tech has requested an oral hearing. There is a letter dated September 18, 2006 attached to the Appeal Form from Mr. Diosdado Delarosa ("Delarosa"), a Director and officer of D-Tech, indicating that he was unable to appear at the hearing before the delegate as he was recuperating from injuries sustained in a motor vehicle accident. He states that he did, however, send his "assistant", Reyes, who was his "assistant in the shop only" to "assist" at the hearing but the latter was "not familiar with this problem" and therefore he now wants an opportunity "to clear the air". Contrary to Delarosa's assertion that Reyes was simply his "assistant in the shop only", Reyes, identified himself at the hearing as Delarosa's partner and co-owner of D-Tech. Moreover, the written submissions in support of D-Tech's appeal submitted by Delarosa afforded D-Tech an opportunity to fully set out its position and "to clear the air", although those written submissions do not materially deviate from the submissions Reyes made on behalf of D-Tech at the hearing before the delegate. It appears that Delarosa and D-Tech, in the Appeal, are downplaying Reyes' role in D-Tech's business and his knowledge concerning Zhuang's complaint to obtain an oral re-hearing "to clear the air". In my view, the matter does not require an oral hearing, nor does it raise any issue that would lead me to conclude that an oral appeal hearing is required. An oral hearing would only allow the parties to make their submissions on the record orally, in addition to their previously filed written submissions and that is not a proper justification for ordering an oral hearing.

9. I am also not persuaded that Delarosa was unable to attend at the hearing before the delegate on May 4, 2006. While D-Tech submitted a medico-legal report of Dr. Mazzarella dated September 1, 2006 (the "Report") (presumably commissioned by Delarosa's counsel in his personal injury action) in support of Delarosa's assertion that he was injured in a motor vehicle accident and could not attend at the hearing, nothing in the Report suggest that he was incapable to attend at a hearing before the delegate. Dr. Mazzarella notes in the Report that he saw Delarosa on March 17, 2006 (approximately a month-and-a-half before the hearing) and that Delarosa, "at work …was not doing any heavy lifting but was doing some light jobs such as changing mufflers, but not engine work that required heavy lifting or prolonged lying or supine positions". Delarosa was attending work prior to the hearing and there is no indication in the Report that he was unable to attend at the hearing to give evidence on behalf of D-Tech. Moreover, if Delarosa was unable to attend at the hearing due to his injuries in the motor vehicle accidents then one would think that he would have communicated with the delegate about his injuries and made an attempt to obtain an adjournment, particularly if Reyes was uninformed about the matter as Delarosa claims. In my view, Reyes was sufficiently informed of the matter, as his submissions on behalf of D-Tech are materially similar to Delarosa's submissions on behalf of D-Tech in the Appeal.

10. Accordingly, I have decided to adjudicate this Appeal solely on the parties' written submissions, the Section 112(5) "Record" and the Reasons for the Determination.

ISSUES

11. The issues to be determined in this appeal are two-fold namely:

1. Did the delegate fail to observe the principles of natural justice in making the Determination?

2. Is there new and relevant evidence that would have led the delegate to a different conclusion on the material issue or issues?

THE FACTS

12. The facts relevant to this Appeal are as follows:

- D-Tech operates an auto repair shop.
- Delarosa, on behalf of D-Tech, hired Zhuang as an Auto Service Technician.
- Zhuang worked for D-Tech from September 14 to December 8, 2005.
- Zhuang filed his Complaint alleging that D-Tech contravened the *Act* by failing to pay him regular and overtime wages, annual vacation pay and statutory holiday pay.
- A hearing of the Complaint was held on May 4, 2006.
- At the hearing, Zhuang attended on his own behalf and Reyes, a partner of Delarosa and a co-owner of D-Tech, represented D-Tech.
- Zhuang stated that he worked six days a week at D-Tech from Monday to Sunday. His hours of work comprised eight hours per day and often longer. His remuneration was $8.00 an hour.
- Zhuang logged his daily work hours on his computer.
- Zhuang stated that there were problems with the payment of his wages from the very beginning of his employment with D-Tech, in that he did neither received full wages nor was he paid wages according to any particular schedule.
- Zhuang also stated that when D-Tech paid him wages it would be in cash, with no accompanying wage statement. Accordingly, Zhuang could not tell what hours he was being paid and if proper deductions were made by D-Tech.
- Zhuang, however, suspected that he was not receiving full payment from D-Tech, as his wages did not appear to match his personally recorded hours.
- Zhuang states that he approached Delarosa to obtain full payment for the hours he worked for D-Tech but Delarosa said he could not pay him fully as the business did not have any or sufficient monies.
- Zhuang claims that during the 13 weeks he worked for D-Tech, he worked a total of 576 hours and received $2,490.00 in wages, which he was unable to verify as net or gross, pay, as no wage statements were provided to him.

- Zhuang's personal records also showed that he worked 13.5 hours on Remembrance Day for which he did not receive any statutory holiday pay.
- Zhuang also submitted a T-4 record provided to him by D-Tech which listed Zhuang's earnings for 2005 at $4,112.00 which Zhuang could not explain as he only received close to half that amount.
- Reyes indicated that his partner, Delarosa, negotiated the terms of Zhuang's employment with D-Tech.
- Reyes indicated that Zhuang agreed he would not be paid for the first month of his employment at D-Tech in order to allow D-Tech to test his suitability as an apprentice.
- According to Reyes, Zhuang was an apprentice under the British Columbia *Apprenticeship Act* and the *Employment Standards Act* did not apply to his training with D-Tech.
- D-Tech paid Zhuang some money in his first month of employment (the apprenticeship period) but claims that the payment was not wages; it was financial support to assist Zhuang during the apprenticeship period. D-Tech intended to get credit for this payment against Zhuang's earnings after his first month of employment.
- D-Tech admitted to paying Zhuang $2,490.00 net (the gross amount being $2,518.00) during his employment with D-Tech but did not provide any record of withholdings, if any, it made on the payment.
- D-Tech also claimed that it paid Zhuang a further $100.00 on January 28th, 2006 but did not provide any record or evidence of this payment.
- Reyes indicated that Zhuang agreed to be paid only straight time for any hours in excess of eight hours a day or forty hours a week and forego vacation p and statutory holiday pay.
- Reyes further submitted that if Zhuang did work any overtime hours it was without D-Tech's knowledge, and D-Tech should not be liable for overtime hours as Zhuang was told that he would not be paid overtime hours.
- Reyes admitted that Zhuang was not paid for all hours worked after his first month at D-Tech and further stated that even if Zhuang was not owed statutory holiday and overtime pay, he was owed wages for straight time.
- At the hearing, Reyes attempted to give Zhuang a cheque for an undisclosed amount, presumably to settle Zhuang's Complaint, but Zhuang refused to accept the cheque.
- According to the delegate, a Demand for Records was sent to D-Tech by certified mail on April 7, 2006 and received and signed for by Delarosa on April 11, 2006.
- Delarosa, on behalf of D-Tech, responded to the Demand for Records stating that D-Tech should not be required to comply with the provisions of the *Act* pertaining to record production because D-Tech's agreement with Zhuang was a training agreement rather than an employment agreement and therefore, the *Act* should not apply.

- D-Tech agreed that Zhuang was owed $2,816.00 in wages on the basis of straight time and there would be a withholding of $446.20 on that amount on the basis of Revenue Canada Agency's tax tables.
- D-Tech also provided its own record of Zhuang's hours worked which record was prepared for the hearing and not contemporaneously when Zhuang was working for D-Tech.
- D-Tech further submitted a letter dated April 21, 2006 signed by Raymond Sotto, D-Tech's apprentice mechanic at the time, confirming that he would not be receiving any remuneration in his first month of work as an apprentice mechanic according the "policy of the company". This document was presented in support of D-Tech's assertion that Zhuang also agreed to work for no wages during his first month of employment with D-Tech.
- The delegate weighed the evidence proffered by both Zhuang and D-Tech, and on the matter of Zhuang's hours of work, the delegate preferred Zhuang's records to D-Tech's records as the latter's records were created for the hearing and not contemporaneously during Zhuang's employment.
- The delegate also found that while D-Tech did not provide to Zhuang any record of payment of any monies, Zhuang received $2,518.00 from D-Tech.
- The delegate also noted that D-Tech claimed that Zhuang received $100.00 on January 28, 2006 but produced no evidence of this payment.
- According to the delegate, the T-4 record D-Tech issued Zhuang showing his wages at $4,112.00, an amount substantially greater than what D-Tech acknowledged paying Zhuang at the hearing, undermined D-Tech's credibility on the matter of wages and statutory deductions paid to Zhuang. Moreover, no explanation was offered by D-Tech's representative Reyes at the hearing as to why the amount on the T-4 record was substantially higher than what D-Tech admitted to paying Zhuang at the hearing.
- The delegate concluded that Zhuang was an "employee" within the meaning of the *Act*, as he was being trained for D-Tech's business and performing "work normally performed by an employee".
- The delegate also concluded that Zhuang's labour for D-Tech qualified as "work" within the meaning of the *Act*.
- The delegate found that Zhuang, as an employee of D-Tech, was owed wages for all hours he worked during the first month of work and the delegate rejected D-Tech's argument that the defunct *Apprenticeship Act* applied to Zhuang's employment.
- The delegate also found that D-Tech did not provide any evidence to support its position that Zhuang agreed to forego overtime wages, annual vacation pay and statutory holiday pay. Moreover, even if Zhuang did agree to such, the delegate indicated that that would be in violation of Section 4 of the *Act*, and such agreement would be void and without any effect.
- The delegate also found that Zhuang usually worked six days a week and often worked over eight hours a day, accruing weekly and daily overtime. The delegate further found that during his period of employment, Zhuang worked 38.5 hours of daily overtime and

68 hours of weekly overtime and accordingly he was entitled to receive overtime pay of $1,278.00 for those hours.

- The delegate further found that Zhuang worked 13.5 hours on November 11, 2005, which was a Remembrance Day. Since Zhuang worked 26 days of the preceding 30 days, he was entitled to time and a half for the first 12 hours worked and double time for any work over 12 hours plus an average day's pay, totalling $232.00.
- The delegate also noted that D-Tech acknowledged that Zhuang did not receive vacation pay while in the employ of D-Tech and that Zhuang was entitled to vacation pay on the basis of four percent of the gross amount he earned, which totalled $214.40.
- The delegate also relied on Section 29(1) of the *Employment Standards Regulation* to impose six administrative penalties of $500.00 each on D-Tech for the latter's contraventions of Sections 17, 18, 27, 28, 40 and 46 of the *Act*.

ARGUMENT

D-Tech's Submissions

13. Delarosa made submissions on behalf of D-Tech in the latter's appeal. In the written submissions, Delarosa essentially reiterates D-Tech's position at the hearing before the delegate. Specifically, in the preamble to his written submissions, Delarosa states, "this is to restate our issues with regard to our appeal on the Determination of the Employment Standards Branch…." Delarosa then goes on to restate the material points made by Reyes at the hearing before the delegate and adds his personal comments on those material points. In particular, Delarosa indicates that Zhuang was referred to D-Tech by a former employee of D-Tech and that is why D-Tech accepted Zhuang as an apprentice. Delarosa further states that from the outset, D-Tech's agreement with Zhuang was that he would not be paid for the first month of work as that was the policy of D-Tech from D-Tech's inception in 2001. Had Zhuang not agreed to this policy, D-Tech would not have hired him, according to Delarosa.

14. With respect to some monies paid to Zhuang in the first month of his work for D-Tech, Delarosa explains that this was to help Zhuang for gas and insurance money for his vehicle as well as some "expenses of daily life".

15. Delarosa points out that Zhuang, during his apprenticeship period, ended his employment with D-Tech around the end of November, 2005 because it was too difficult for him to work but D-Tech tried to convince him to continue and invested "so much time and effort to help him" and "D-Tech… was on the losing end in this undertaking". According to Delarosa, D-Tech simply wanted to help people including Zhuang enter the industry and was training Zhuang not for the purposes of D-Tech's business but in order for him to prepare himself to enter the trade as a licensed mechanic. According to Delarosa, D-Tech "actually lost time, effort and money" in its efforts to assist Zhuang, particularly since much of the work performed by Zhuang had to be re-done due to mistakes on Zhuang's part as he was an apprentice.

16. Delarosa reiterated D-Tech's policy pertaining to apprentices, that is, that apprentices were not to receive remuneration in the first month of their apprenticeship. According to Delarosa, Zhuang was informed of this policy in advance of being hired by D-Tech. In support of this latter assertion, Delarosa, as did his colleague Mr. Reyes at the hearing before the delegate, refers to the document signed by another

apprentice at D-Tech, a Mr. Sotto, indicating that he was not to receive pay during the first month of his apprenticeship at D-Tech as that is D-Tech's policy.

17. Further, while Delarosa does not unequivocally state that Mr. Zhuang was required by D-Tech to keep or submit any timesheets while he was in the employ of D-Tech but complains that D-Tech "gave him a calendar to fill out for his working time" which then was not returned to D-Tech.

Zhuang's Submissions

18. Zhuang, in his submissions, indicates now that he commenced employment with D-Tech, the first time, on July 14, 2005. He indicates that Reyes, Delarosa's partner, interviewed him for employment at the time and wanted to try him out. He indicates that he was never asked to work for free but discovered in early August that D-Tech was not going to pay him wages. When he discovered this he disputed D-Tech's decision with Delarosa and the latter agreed to pay him, in a week's time, only for the cost of gasoline as Zhuang drove his vehicle to and from work. Since Zhuang was not going to receive any wages, Zhuang decided to quit his employment on August 9, 2005. He subsequently went to collect the gasoline money Delarosa had agreed to pay him but when he met with Delarosa the latter indicated that he did not have any money to pay him then. Zhuang then returned to D-Tech on September 8, 2005 and discovered that Delarosa was not at D-Tech's shop. Zhuang then spoke with Delarosa's partner, Reyes, who indicated to him that D-Tech would pay him (presumably for work) if he worked for D-Tech again. Zhuang states that he then telephoned Delarosa to confirm that he would get paid this time by D-Tech and Reyes confirmed to him that he would. As a result, Zhuang commenced his employment with D-Tech, for the second time, on September 14, 2005.

19. Zhuang submitted a document (which was not previously submitted by him at the hearing before the delegate) showing a statement purportedly prepared by D-Tech indicating Zhuang's gross salary for the pay period ending September 30, 2005 in the gross amount of $768.00 which, after deductions netted to $638.77.

20. Zhuang further submits that because he did not receive "full pay" from D-Tech subsequently, he quit his employment for the second time on December 8, 2005.

21. Zhuang, in his written submissions, indicates that when he filed his Complaint against D-Tech with the Employment Standards Branch, he attended for mediation in March 2006 and received a check of $600 from Reyes, which was rejected by the bank when he later attempted to cash it. Apparently Zhuang was charged a $3.00 fine by his bank as a result. Furthermore, Zhuang indicates that at the mediation, the officer assisting them indicated that D-Tech owed him $1865.13 ($600 of which was paid by D-Tech to Zhuang by way of a cheque referred to above). The balance of the funds, $1,265.13 was subsequently paid by D-Tech to Mr. Zhuang two weeks after the mediation and it too did not clear at the bank, when Mr. Zhuang went to negotiate it. He was further charged a $3.00 fine for this bounced cheque. Mr. Zhuang also states that he lost 3 hours of work when he was required to attend at the Employment Standards Branch (the "Branch") to sign for and collect the latter cheque D-Tech submitted to the Branch. At his then hourly rate or $9.00 per hour, Zhuang claims he lost $27 of wages, which he says he should be reimbursed by D-Tech. Finally, Zhuang indicates that after the last cheque was rejected at the bank, he received a telephone call from Reyes who apologized to him for the rejected cheques and told him that he would give him some cash, if Zhuang went to see him. However, Zhuang decided to proceed with the Complaint.

Director's Submissions

22. The Director submits that D-Tech is simply restating the argument made at the hearing rather than identifying a breach of natural justice or an error of law or producing any new evidence that was not available at the hearing. Moreover, the Director submits that Delarosa's failure to attend at the hearing before the delegate did not affect the ultimate conclusion in the Determination particularly since "Mr. Delarosa's argument at appeal is the same as his written argument that Mr. Reyes presented and relied on at the hearing".

ANALYSIS

Error of Law

23. D-Tech did not allege an error of law as a ground of appeal in its Appeal Form, although D-Tech appears to be challenging the applicability of the *Act* to Zhuang's employment with D-Tech. In my view, D-Tech's failure to allege error of law does not preclude me from considering the matter on this appeal. The Tribunal, following the decision in *Triple S Transmission Inc. BC EST #D141/03*, has stated in numerous subsequent decisions that many appellants do not retain lawyers when lodging their appeals. Where appellants are without legal representation it is very possible that they may not fully appreciate the technical legal meaning of the grounds of appeal delineated in Section 112 of the *Act* and also appearing in the Appeal Form. It is for this reason that the Tribunal should seek to discern, in each appeal, the true basis for the appellant's challenge to a determination, in order to do justice to the parties, regardless of the particular box the appellant has checked off on the Appeal Form. However, at the same time, the Tribunal must be cautious in exercising its discretion to consider a ground of appeal not formally identified in an appellant's Appeal Form as the other parties to the appeal (in this case the Director and the employee Zhuang) may not have an opportunity to provide an argument relating to any ground not formally identified in the Appeal Form. Having said this, since D-Tech did not have legal representation in its appeal, I have considered D-Tech's submission that the *Act* does not apply to Zhuang's employment relationship with D-Tech because he was an apprentice with D-Tech under the *Apprenticeship Act* as a challenge by D-Tech to the Determination on the basis of error of law.

24. Having said this, I have thoroughly examined and find persuasive the delegate's analysis and consequent conclusion that the *Act* applies to Mr. Zhuang because he was being trained for D-Tech's business and "performing work normally performed by an employee" and thus he was an "employee" within the definition of the *Act*. I also find compelling the delegate's conclusion that Zhuang's labour for D-Tech qualified as "work" as defined by the *Act*. Accordingly, the *Act* applies to the relationship between Zhuang and D-Tech.

25. I also agree with the delegate's analysis that the *Apprenticeship Act* referred to by D-Tech was repealed in 1997 and replaced by the *Industry Training Apprenticeship Act* which also was repealed in 2003, well in advance of Zhuang's employment with D-Tech. Even if those acts existed today, given my knowledge of those acts, I highly doubt that they would apply to prevent Zhuang the benefit of the minimum standards in the *Act*, particularly since Zhuang, when in the employ of D-Tech, was working in an employee/employer relationship. I also find that the delegate correctly set out in the Determination that apprentices, if working in an employee/employer relationship, are covered by the *Act* and entitled to the protection of the *Act*. Therefore I do not find there to be an error of law in the delegate's determination that the *Act* applies in D-Tech's employment of Zhuang.

Natural Justice

26. D-Tech alleges, without any supporting evidence, that the Director breached the principles of natural justice**.** The delegate, in adjudicating Zhuang's complaint and making the Determination, has a duty to observe the principles of natural justice or a duty of procedural fairness. As indicated by the Supreme Court of Canada in *Cardinal v. Kent Institution, [1985] 2 S.C.R. 643* at 653, "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual". While the content of natural justice or the duty of procedural fairness varies according to the circumstances, what is required is that parties be given notice of the case, be told the case against them, and be afforded a fair opportunity to reply or answer the case against them: *Kaloti (c.o.b. National Courier Service), BC EST # D232/99.*

27. In the instant case, D-Tech's allegation that the delegate breached principles of natural justice is a bare allegation without any supporting evidence. D-Tech was aware of the Complaint, was afforded a fair opportunity to respond to the Complaint, attended at the hearing of the Complaint before the delegate by its representative, Reyes, and made submissions materially similar to its written submissions in this appeal. While D-Tech's co-owner, Delarosa, did not attend at the hearing, as previously indicated, he had his business partner, Reyes, attend and make submissions on behalf of D-Tech. Although Delarosa claims that Reyes was not fully apprised of the matter, Delarosa had an opportunity, in advance of the hearing, to seek an adjournment if he was, for health or other reasons, unable to attend, particularly if he was the only person with sufficient knowledge of the matter. However, Delarosa did not make any attempt to obtain an adjournment directly or through his partner, Reyes. Further, when Reyes attended at the hearing, he did not suggest that he was uninformed of the matter. To the contrary, in light of similar written submissions of Delarosa on behalf of D-Tech in this appeal, Reyes appears to have been very well informed of the matter and in my opinion Delarosa's attendance at the hearing would not have materially altered the Determination. Therefore, I reject this ground of appeal of D-Tech's.

New Evidence

28. D-Tech alleges that there is new evidence that has become available that was not available at the time of the Determination that would have led the delegate to a different conclusion. In *Re Merilus Technologies Inc., BC EST # D171/03* the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

* 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.

29. In the instant case, D-Tech has not adduced any new evidence. The written submissions of D-Tech in the appeal are materially the same submissions made by its representative Reyes at the hearing before the delegate. If there is any difference in the submissions on appeal and at the hearing it is in the source of the submissions. That is, previously at the hearing Reyes made submissions on behalf of D-Tech and now in the Appeal it is Reyes' partner, Delarosa. While Delarosa has tried to further elucidate the submissions at the hearing, they are materially the same submissions and as Delarosa states in the preamble to the written submissions "this is to restate our issues with regard to our appeal on the Determination of the Employment Standards Branch…." The appeal process is not intended to be a second opportunity for the appellant to present its case or have a hearing de novo. In the instant case, D-Tech is clearly dissatisfied with the Determination and understandably so as it stands to pay significant sums to Zhuang and equally significant sums in administrative penalties for contraventions of the *Act*. However the appeal procedure is not intended to permit dissatisfied parties like D-Tech to have the second kick at the proverbial can.

30. As an aside, even if the written submissions in the appeal of D-Tech containing elucidations of the material submissions at the hearing comprised new evidence, D-Tech would fail to satisfy the first of the four-fold tests in *Re Merilus Technologies Inc.* as there is nothing in the elucidations that D-Tech could not, with the exercise of due diligence, have discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. I need not consider the balance of the requirements in *Merilus Technologies Inc*. as they are conjunctive requirements.

31. Therefore, D-Tech's appeal on the ground of new evidence also fails.

32. Zhuang has, in his written submissions, provided new evidence comprising of information that he previously worked for D-Tech prior to the September 14, 2005 (July 14, 2005 to August 9, 2005) and quit when he was not paid wages. He has also produced a document showing payment to him from D-Tech of some monies for the pay period ending September 30, 2005. Zhuang provides this information without any explanation why it was not provided at the hearing. The information in question is not evidence that could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the Determination being made. While one may argue that the information may constitute rebuttal information and should be allowed, I do not have to deal with this issue as the information is not material to my decision here.

Zhuang's new claims

33. With respect to Zhuang's claims for bank fees of $3.00 he was charged on each of the two occasions when he went to cash the cheques he received from D-Tech after the mediation at the Branch as well as his claim for $27 for 3 hours of his lost wages when he went to the Branch to collect D-Tech's cheque, these claims are not properly before me. If Zhuang wished to claim additional compensation, he should have filed an appeal and presented an appropriate case to justify varying the Determination. As indicated by the Tribunal in *Re Academex Systems Inc., BC EST D032/05*: "The Tribunal has repeatedly held that the filing of an appeal by one party with respect to certain particular issues does not 'open up' the determination being appealed such that respondents may raise their own separate challenges to the determination. An appeal to the Tribunal is not in the nature of a de novo hearing."

ORDER

34. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $3,187.28, together with whatever additional interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance. I also confirm the Determination relating to the six administrative penalties of $500.00 each against D-Tech for contravening the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal