Employment Standards TRIBUNAL

An appeal

- by -

Deepthi Angela A. Perera
("Ms. Perera")

- 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/108

DATE OF DECISION: November 22, 2012

DECISION

SUBMISSIONS

Deepthi Angela A. Perera	on her own behalf
Tyler Siegmann	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), brought by Deepthi Angela A. Perera ("Ms. Perera"), of a determination that was issued on August 31, 2012 (the "Determination") by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that no wages were outstanding or due to Ms. Perera and that no further action would be taken regarding Ms. Perera's complaint. However, the Determination did find that Ms. Perera's former employer, Corelogic MLS Solutions Canada, ULC ("Corelogic"), contravened section 28 of the *Act* for failing to keep records of hours worked by Ms. Perera on each day, and levied an administrative penalty of $500.00 against Corelogic, pursuant to section 29(1) of the *Employment Standards Regulation* (the "*Regulation*").

2. Ms. Perera appeals the Determination on all three (3) available grounds under section 112(1)(a), (b) and (c) of the *Act*. In particular, she states that the Director erred in law and failed to observe the principles of natural justice in making the Determination. She also submits that there is new evidence that has become available that was not available at the time when the Determination was being made. She seeks the Tribunal to change or vary the Determination.

3. Pursuant to section 36 of the *Administrative Tribunals Act*, 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. At this stage, I am adjudicating this appeal based solely on Ms. Perera's written submissions and my review of the section 112(5) "record" that was before the delegate when he was making the Determination. If I am satisfied that the appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1), Corelogic and the Director will be invited to file further submissions. Conversely, if the appeal is not meritorious, it will be dismissed under section 114 of the *Act*.

BACKGROUND FACTS

4. Corelogic operates a real estate technology business and employed Ms. Perera as an Intermediate Database Support Engineer at its office in Burnaby, British Columbia, commencing September 17, 2007. Approximately four (4) years and two (2) months later, on December 6, 2011, Corelogic terminated Ms. Perera's employment without cause. Ms. Perera filed a complaint against Corelogic on January 4, 2012, alleging that the latter contravened the *Act* by failing to pay her wages for extra hours over 40 hours per week and for compensation for length of service, totalling four (4) weeks' wages. She also alleged that Corelogic contravened section 39[1] of the *Act* by requiring her to work excessive hours detrimental to her health and safety. She further asserted that Corelogic misrepresented terms and conditions of employment which

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[1] *No excessive hours*

39 Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.

resulted in a contravention of section 8[2] of the *Act*. However, since section 74(4) of the *Act* requires a complaint regarding section 8 to be delivered in writing to an office of the Employment Standards Branch (the "Branch") within six (6) months after the date of contravention, and since Ms. Perera's section 8 allegations related to events that occurred in August 2007 before she commenced employment with Corelogic on September 17, 2007, pursuant to section 76(3)(a) of the *Act* the delegate decided that Ms. Perera's complaint alleging the breach of section 8 would not be adjudicated as it was out of time under the *Act*.

5. At the hearing of Ms. Perera's complaint on July 26, 2012, the delegate considered the following three (3) issues:

1. Is Ms. Perera entitled to wages for extra work over 40 hours per week? If so, in what amount?
2. Did Corelogic contravene section 39 of the *Act* by requiring Ms. Perera to work excessive hours detrimental to her health and safety? If so, what is the remedy?
3. Did Corelogic pay Ms. Perera the correct amount of compensation for length of service? If not, what amount is outstanding?

6. With respect to the first issue, whether Ms. Perera was entitled to wages for extra work over 40 hours per week, the delegate considered both the evidence of Ms. Perera and Corelogic's witnesses, namely, Corelogic's Director of Database & System Support, Mr. Daryl Smoot ("Mr. Smoot"), and Corelogic's Database Administrator (intermediate), Mahmoud Kamoun ("Mr. Kamoun"), who was employed in a similar capacity to Ms. Perera, but in Corelogic's office in Virginia, United States.

7. The delegate noted that under Ms. Perera's employment agreement with Corelogic dated August 24, 2007, Corelogic agreed to pay her an annual salary of $70,000.00 based on a 40-hour work week. This salary was later increased to $73,778.64. However, the delegate noted that if Ms. Perera worked beyond 40 hours per week without extra pay, she would only be entitled to extra wages at the regular wage rate because she was not entitled to overtime rates set out in section 40 of the *Act* because she was a "high technology professional" as defined by section 37.8(1) of the *Regulation*. By virtue of section 37.8(2) of the *Regulation*, Part 4 of the *Act*, with the exception of section 39, does not apply to high technology professionals such as Ms. Perera. Having said this, the delegate went on to point out that Mr. Smoot of Corelogic acknowledged that Corelogic did not maintain a record of the hours Ms. Perera worked each day, contrary to and in breach of section 28(1)(d) of the *Act*. In the circumstances, the delegate held that it would be appropriate to consider Ms. Perera's record and oral evidence of her hours of work, noting that the burden of proof was on Ms. Perera to show that she worked in excess of 40 hours per week in order to be paid additional wages. Having said this, the delegate considered Ms. Perera's evidence and, in concluding that Ms. Perera failed to meet the burden placed upon her to show that she worked in excess of 40 hours per week, he reasoned as follows:

> Ms. Perera testified that she worked a regular schedule of 9:00 a.m. to 5:00 p.m. five days per week, in addition to extra early morning hours to implement TDs or focus on projects. Ms. Perera said her

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[2] *No false representations*

8 An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:

(a) the availability of a position;
(b) the type of work;
(c) the wages;
(d) the conditions of employment.

> assertion is corroborated by documentary evidence, including a personal calendar, work flow notes and Corelogic's TD System Logs. However, these documents do not account for total hours worked in a day or week. They only show scheduled work activities or a time when a TD was complete. Even analyzing those documents together do not establish total hours of work in a day or week. Overall, the calendar, work flow notes and TD System Logs are insufficient to prove on the balance of probabilities that Ms. Perera worked in excess of 40 hours per week.
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> The 2010/2011 Focal Review Form is not helpful to establish Ms. Perera's case. Ms. Perera's Focal Review comment about being available for daytime operational issues while performing 'off hour' TD updates does not directly prove a work week beyond 40 hours per week. Accordingly, no weight will be given to this evidence.
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> The only evidence Ms. Perera has to establish her case regarding additional hours worked is her oral testimony. Ms. Perera stated she is able to recall approximately the amount of extra hours worked per month using the documentary evidence. From June 2011 to December 2011 she estimated a total of 204 hours of work was performed beyond her 40 hour work week.
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> I am not prepared [to] give the estimations based on memory significant weight. The estimations lack a sufficient amount of detail to convince me the evidence is reliable. For example, during cross examination Ms. Perera was asked to review the evidence and present calculations to demonstrate extra hours worked in a day or month. However, Ms. Perera was unable to complete this task.
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> Mr. Smoot directly challenges Ms. Perera's oral testimony. He testified that Ms. Perera was not compelled by him, Chris Campbell or other Corelogic employees to work from 9:00 a.m. to 5:00 p.m. in addition to extra hours. Ms. Perera was given flexibility to schedule her own hours of work within the 40 hour agreement. Mr. Smoot's evidence concerning a flexible work arrangement totalling 40 hours per week was corroborated by Mr. Kamoun's evidence. Mr. Kamoun testified if he worked longer hours at home, then he would adjust his office schedule to balance his work week to 40 hours. Mr. Kamoun is not required to work over 40 hours per week to implement TDs. In light of the evidence of Mr. Smoot and Mr. Kamoun, I am not prepared to find that Ms. Perera's working conditions were any different or required her to work beyond 40 hours per week.
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> There is insufficient evidence to support a finding that Ms. Perera worked hours in excess of 40 hours per week. Ms. Perera's case lacks supporting evidence, such as a contemporaneous record of work hours, a witness to verify her work schedule or a directive from Corelogic to work over 40 hours per week. In the absent [*sic*] of supporting evidence to validate Ms. Perera's oral testimony, I find no regular wages are outstanding to Ms. Perera.

8. With respect to the second issue, whether Corelogic contravened section 39 of the *Act* by requiring Ms. Perera to work excessive hours detrimental to her health and safety, the delegate took into consideration the particular position of Ms. Perera and her job responsibilities in her position as Intermediate Database Support Engineer. The delegate also considered Ms. Perera's claim that Corelogic required her to work regular office hours and implement Test Directives (TDs) between 1:00 a.m. and 7:00 a.m. which, in combination, she alleged were excessive and detrimental to her health and safety. The delegate also noted that given his findings that Ms. Perera did not provide sufficient evidence to demonstrate that she worked more than 40 hours per week, the penultimate questions he identified as requiring answers here were two-fold: (i) whether Ms. Perera's work schedule totalling 40 hours per week constituted "excessive hours" and (ii) if so, was this work schedule "detrimental to her health or safety" within the meaning of section 39 of the *Act*.

9. The delegate then went on to note that the *Act* did not define "excessive hours" but the Tribunal in *Kenneth Johnston* (BC EST # D071/10) interpreted "excessive" as that exceeding what is necessary or proper. In determining whether hours worked by Ms. Perera exceeded what is "necessary or proper", the delegate considered Ms. Perera's job responsibilities and context of employment, including the nature of work she was performing, the circumstances of her work, the period of time over which the hours were being worked by

her and any other circumstances related to her work hours. In concluding that Ms. Perera's work hours did not constitute "excessive hours" under section 39 of the *Act*, the delegate reasoned as follows:

> Ms. Perera was an Intermediate Database Support Engineer, which included designing, developing, implementing, installing and maintaining database solutions from a computer station. Ms. Perera also performed some administrative functions and attended project meetings. Corelogic and Ms. Perera agreed in a contract of employment that this employment role was based on 40 hours of work. She was given flexibility to arrange her own work schedule unless she was required to attend a team meeting or implement TDs between the hours of 1:00 a.m. and 7:00 a.m. According to the TD System Logs, from June 2011 to December 2011 (six months) there were 15 occasions where Ms. Perera worked hours between 1:00 a.m. and 7:00 a.m.
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> Ms. Perera agreed to an employment arrangement where she would perform 40 hours of work per week and she worked those hours for approximately four years without complaint to Corelogic. The employment arrangement and history does not present a situation of someone being 'required or directly or indirectly allowed' to work excessive hours. In fact Ms. Perera was permitted to schedule her own hours within a guideline of 40 hour[s] per week. I find Ms. Perera's hours of work were not excessive under section 39 of the Act.
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> Section 39 also states that an employer must not require an employee to work 'hours detrimental to the employee's health or safety'. Ms. Perera has alleged that her hours of work, particularly the early morning shifts, led to personal health issues that were detrimental to her health and safety. To prove the assertion she relied on her own opinion, Dr. Lui's letter and a National Post article titled 'Lack of Quality Sleep Increases Heart Attack Risk'.
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> The National Post article is not helpful in considering a contravention of section 39 of the Act. The article is not relevant to prove hours at work caused detriment to Ms. Perera's health or safety. Instead the article provides general information from a number of studies about the effects of insomnia.
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> Ms. Perera offered an opinion that her hours of work caused a lack of sleep which 'took a toll'on her health. Particularly, her blood pressure elevated and she experienced an irregular heartbeat. Ms. Perera said these symptoms could have escalated to a heart attack. She claimed the stressful hours of work led to personal health issues that were harmful to her healthy and safety. This opinion is of little assistance to decide this matter as Ms. Perera has no special knowledge or expertise to persuade me her health issues were caused because of hours at work. No weight will be assigned to Ms. Perera's opinion as the information is not reliable.
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> Dr. Lui's letter dated July 5, 2012 is not useful to determine Ms. Perera's hours were detrimental to her health and safety. After close inspection of this letter, Mr. [*sic]* Lui is basically repeating Ms. Perera's opinion as it relates to diagnosing the cause of her high blood pressure. While Dr. Lui may have started Ms. Perera on medication to control her high blood pressure, Dr. Lui has not provided any affirmed testimony or specific medical evidence connecting Ms. Perera's medical issues to hours of work at Corelogic. No weight will be given to Dr. Lui's letter dated July 5, 2012.
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> Based on the above, I find there is insufficient evidence to support a finding that Ms. Perera was required to work hours that were detrimental to her health or safety. Accordingly, I find the Employer has not contravened section 39 of the Act.

10. With respect to the final issue, that is, whether Corelogic paid Ms. Perera the correct amount of compensation for length of service pursuant to section 63(4)[3] of the *Act*, the delegate noted that by virtue of her length of service, Ms. Perera is entitled to four (4) weeks' compensation. Ms. Perera asserts that the amount Corelogic paid her, namely, $5,675.28, is insufficient because four (4) weeks of pay based on her monthly salary equals $6,148.22. The delegate rejected Ms. Perera's argument stating that if Ms. Perera were right and one month equalled exactly four (4) weeks, then there would only be 48 weeks rather than 52 weeks in a year, and a month would have no more than 28 days. Having said this, the delegate went on to identify the correct method to calculate Ms. Perera's compensation for length of service based on the formula set out in section 63(4) of the *Act*. In particular, the delegate stated:

> The correct method to calculate Ms. Perera's compensation pay is to start by calculating her weekly wage, which is $1,418.82 [($6,148.22 per month X 12 months) / 52 weeks]. Next, apply the formula provided by section 63(4) of the Act. The result is four weeks' compensation pay equals $5,675.28, which is the exact amount Corelogic paid. I find Ms. Perera is not entitled to additional compensation pay as Corelogic paid the correct amount in accordance with section 63(4) of the Act.

REASONS FOR THE APPEAL

11. As previously indicated, Ms. Perera appeals the Determination on all three (3) available grounds under section 112(1)(a), (b) and (c) of the *Act*, namely, that the delegate erred in law and 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 made. Ms. Perera is asking the Tribunal to change or vary the Determination and, more specifically, to order Corelogic to pay her "overtime wages" as well as compensation under section 39 of the *Act*. I note Ms. Perera's reasons for appeal are particularized in two (2) documents totalling 18 pages, and attached to her Appeal Form dated September 27, 2012, and emailed to the Tribunal on the same date. Based on my review of these documents, it is clear that Ms. Perera's reasons and arguments do not support her grounds of appeal under the error of law and natural justice grounds, but largely delineate her disagreement with the delegate's findings or conclusions of fact. Ms. Perera is also asking the Tribunal to consider some evidence that was not before the delegate when the Determination was being made. She characterizes this as "new evidence", and I will address it more specifically below under the heading "Findings and Analysis" as this evidence does not meet the Tribunal's test for accepting fresh evidence on appeal. Having said this, I will address Ms. Perera's arguments on appeal in the order in which she has raised them in her written submissions.

FINDINGS AND ANALYSIS

(i) Error of Law

12. In her written submissions, Ms. Perera submits that the delegate erred in law in dismissing her claim for overtime. In particular, she claims that she manually maintained handwritten records of all implementation work she did for Corelogic, with a breakdown of all steps needed to make a proper estimate of time in her notebooks while manually maintaining her nightly script running times in calendars. She submits that anyone in the implementation going through this information can "figure out how long one was expected to work on

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[3] **63(4)** The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
(b) dividing the total by 8, and
(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

them (not just the script execution time) as they are clearly cut out work". She submits that in the calendars she produced at the hearing, the hours she spent on project overtime work are marked, but the delegate disregarded them. She also submits that the delegate "hid all evidence" she provided to prove that she was working from 9:00 a.m. to 5:00 p.m. daily in addition to the TD work she did, which was part of the overtime hours. In the following five (5) pages or so of her written submissions, Ms. Perera goes on to reiterate the evidence she adduced at the hearing and largely challenges the Director's findings of fact. In my review of the Reasons for the Determination (the "Reasons"), I find that the delegate considered the very evidence Ms. Perera reiterates in her written submissions. In particular, he considered specifically Ms. Perera's testimony including her evidence that she worked a regular schedule of 9:00 a.m. to 5:00 p.m. five (5) days per week in addition to the extra morning hours to implement TDs or focus on projects. The delegate also considered her documentary evidence, including her personal calendar (parts of which she has, again, reproduced in the appeal), work flow notes and Corelogic's TD System Logs. However, the delegate, contrary to Ms. Perera's liking, found that these documents did not account for total hours she worked in a day or week. He found the documents as showing scheduled work activities or a time when a TD was completed but not the total hours of work in a day or week performed by Ms. Perera. As a result, the delegate concluded the documents were insufficient to prove on a balance of probabilities that Ms. Perera worked in excess of 40 hours per week. In addition, the delegate also found Ms. Perera mainly relied upon her memory recall regarding additional hours worked, which she estimated at 204 hours during June 2011 to December 2011. The delegate found Ms. Perera's estimations of overtime hours worked, based on memory, insufficient and unconvincing as reliable evidence, particularly when during her cross examination, she was asked to review the evidence and present calculations to demonstrate extra hours worked in a day or month, but she was unable to complete this task.

13. Ms. Perera further carries on in her submissions challenging the delegate's assessment of her evidence and preference of the evidence of Corelogic's witnesses, Mr. Smoot and Mr. Kamoun. I do not think it is necessary for me to reiterate verbatim those submissions. However, it should be noted that an appeal to the Tribunal is not meant to be a reinvestigation of the complaint, nor is it intended to simply be an opportunity to re-argue positions taken during the complaint process in the expectation that the Tribunal will reach a different conclusion. The purpose of an appeal is to correct any errors in a determination provided the appellant discharges her burden to show that the delegate committed an error. Having said this, the Tribunal does not consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law. In *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal adopted the following definition of "error of law" in *Gemex Development Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA):

> (1) A misinterpretation or misapplication of a section of the Act;
>
> (2) A misapplication of an applicable principle of general law;
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> (3) Acting without any evidence;
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> (4) Acting on a view of the facts which could not reasonably be entertained; and
>
> (5) Adopting a method of assessment which is wrong in principle.

14. Based on my review of the Reasons and the section 112(5) "record", I do not find that the delegate misinterpreted or misapplied the *Act* or any applicable principles of general law in dismissing Ms. Perera's overtime claim. I also find that this is not a case of where the delegate acted without any evidence or on a view of the facts which could not reasonably be entertained or adopted a method of assessment which was wrong in principle in arriving at his conclusion on this issue. To the contrary, I find that there was sufficient evidence for the findings and conclusions of the delegate with respect to Ms. Perera's overtime claim. More particularly, the delegate weighed the evidence of Ms. Perera and of the witnesses of Corelogic and preferred

the evidence of the latter over Ms. Perera's, which was open for him to do. He found Ms. Perera's evidence lacked sufficient amount of detail to convince him of its reliability, particularly when the recorded evidence did not specifically account for total hours worked in a day or week by her and only showed scheduled work activities and when a TD was completed. The delegate was also influenced in his decision on this issue by Ms. Perera's failure to demonstrate during cross examination, based on the review of the evidence, what extra hours she worked in a day or a month, as well as the evidence of Corelogic's witnesses.

15. With respect to Ms. Perera's allegation that the delegate "hid all evidence" she provided to prove that she was working from 9:00 a.m. to 5:00 p.m. daily in addition to the TD work she performed, I do not find any evidentiary basis for that. It is no more than a bare assertion and one which is not borne out in evidence. To the contrary, I find that the Director considered this evidence of Ms. Perera, together with the evidence of the witnesses of Corelogic, and, particularly, the evidence of Mr. Smoot, and appears to have preferred the evidence of Corelogic's witnesses as he states in the Reasons as follows:

> Mr. Smoot directly challenges Ms. Perera's oral testimony. He testified that Ms. Perera was not compelled by him, Chris Campbell or other Corelogic employees to work from 9:00 a.m. to 5:00 p.m. in addition to extra hours. Ms. Perera was given flexibility to schedule her own hours of work within the 40 hour agreement. Mr. Smoot's evidence concerning a flexible work arrangement totalling 40 hours per week was corroborated by Mr. Kamoun's evidence. Mr. Kamoun testified if he worked longer hours at home, then he would adjust his office schedule to balance his work week to 40 hours. Mr. Kamoun is not required to work over 40 hours per week to implement TDs. In light of the evidence of Mr. Smoot and Mr. Kamoun, I am not prepared to find that Ms. Perera's working conditions were any different or required her to work beyond 40 hours per week.

16. In the circumstances, I do not find Ms. Perera has established an error of law on the part of the delegate.

17. Having said this, I note that Ms. Perera, in context of her submissions on the error of law ground of appeal pertaining to her overtime claim, submits some particulars of settlement discussions between the parties at a mediation held before the hearing of her complaint. I do not find those discussions helpful or relevant and, further, they are inappropriate for the Tribunal to consider in this appeal because they constitute privileged communications between the parties undertaken in a confidential-settlement context. But for the privilege attached to such discussions, parties would not freely engage in such discussions and this would negatively impact on the settlement process.

(ii) Natural Justice

18. With respect to the natural justice ground of appeal, I note that in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, [2005] B.C.E.S.T.D. no. 55 (QL), the Tribunal stated that the principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

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

> The 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.

20. In this case, there are two (2) submissions made by Ms. Perera in support of the natural justice ground of appeal. In the first, she indicates that the delegate "by force, illegally changed the original hearing date and conditions at the pre-hearing in spite of [her] requesting to stick to the original issues and date of the hearing". My review of the section 112(5) "record" shows that, originally, the hearing was scheduled for June 27, 2012, with a pre-hearing conference scheduled on June 14, 2012, by telephone conference call. The pre-hearing did take place and in a letter dated June 15, 2012, addressed to both parties, a delegate of the Director noted that, during the pre-hearing, the parties agreed to an adjournment of the complaint hearing to Thursday, July 26, 2012. I note in the "record", there are two (2) emails dated June 15, 2012, from Ms. Perera to the delegate advising that she felt it was unfair for her to submit her evidence and will-say statements prior to the hearing on July 11, 2012, when Corelogic had to submit its evidence and will-say statements on July 18, 2012. She felt that both parties should complete their submissions on the same day, failing which Ms. Perera asked for the hearing to be held on June 27, 2012, the original date of the hearing. In a response email, dated June 19, 2012, from the same delegate to Ms. Perera, the delegate notes that the amended Notice of Complaint Hearing, issued after the first pre-hearing, contained the terms and conditions discussed and agreed to by both parties, and that she would not be in a position to make any changes to the dates, times or scheduled submission dates, but would consult with the adjudicator and then respond to Ms. Perera's request. Thereafter, the adjudicator scheduled a second pre-hearing between the parties on July 4, 2012. I do not see any correspondence subsequent to that on the issue of Ms. Perera's disagreement with the previously-agreed upon new hearing date of July 26, 2012. Based on my review of the evidence, I do not see any basis supporting Ms. Perera's allegation that the Director "by force" or "illegally" changed the original hearing date of June 27, 2012. It would appear that the rescheduled date was agreed to by both parties at the pre-hearing of June 14, 2012, and it only became an issue for Ms. Perera because of the different submission dates for the parties' evidence and will-say statements. I do not find that the change in the hearing date, particularly when done consensually by the parties, as indicated in the "record", violates any natural justice rights of Ms. Perera. From my review of the "record" and, particularly, the Reasons, it is clear to me that not only was Ms. Perera afforded an opportunity to know the evidence of Corelogic, including the latter's submissions, in advance of the complaint hearing, but she had the opportunity to, and did, present her evidence fully at the hearing before an independent decision-maker. I do not find any basis to conclude that Ms. Perera was denied procedural fairness, and I find her assertion that the Director "by force" or "illegally" changed the original hearing date is without merit.

21. I also do not find any basis for Ms. Perera's bare assertion that she was not allowed to cross examine Mr. Smoot "for all the wrong things he mentioned that [she] did not agree [with]". From my review of the Reasons, it would appear that she had a full and fair opportunity to not only adduce her evidence, but to respond to the evidence of Corelogic's witnesses. I therefore, do not find any merit in Ms. Perera's natural justice ground of appeal.

(iii) New Evidence

22. Ms. Perera has attached the following documents to her Appeal Form:

1. A series of emails between Ms. Perera and the delegate involved in the pre-hearing process advising Ms. Perera of the rescheduled hearing date which both parties consented to at a prehearing conference of June 14, 2012, but which Ms. Perera objected to because of the different dates for the parties to submit their evidence, including will-say statements;

2. A series of email exchanges from July 6 to July 9, 2012, between an Industrial Relations Officer at the Branch and Ms. Perera pertaining to the scheduling of a conference call with Ms. Perera to discuss potential settlement;

3. A copy of Ms. Perera's letter of July 24, 2012, to the delegate containing details of settlement discussions between Ms. Perera and the Industrial Relations Officer, Ms. Yao, and her complaint that Ms. Yao did not advise her "regarding Dr. Lui", presumably referring to the requirement that Dr. Lui be available for cross examination by Corelogic at the hearing if Dr. Lui's medical letter was relied upon by Ms. Perera;

4. Parts of Ms. Perera's personal calendar, pictures of her notebooks, and note pads with handwritten notes and emails relating to the work or TDs she performed, including work she claims to have been done during overtime hours;

5. Clinical records of Dr. Albert Lui from August 11, 2009, to September 17, 2009, pertaining to Ms. Perera;

6. Clinical records of Dr. Albert Lui from November 18, 2009, to December 21, 2009;

7. Clinical records of Dr. Albert Lui from January 26, 2010, to May 18, 2010, pertaining to Ms. Perera;

8. Medical letter, dated September 14, 2012, from Dr. Albert Lui pertaining to Ms. Perera;

9. A single-page Focal Review Form containing Ms. Perera's self-evaluation of her performance competencies with Corelogic;

10. A summary of unpaid overtime hours for the period June 2011 to December 2011, prepared by Ms. Perera;

11. An ADP Statement of Earnings and Deductions of Ms. Perera for the period ending October 31, 2011;

12. Email from Shani C. Corzo ("Ms. Corzo"), HR Business Partner at Corelogic, to Ms. Perera responding to the latter's previous email claiming overtime pay from Corelogic;

13. A copy of Ms. Perera's contract of employment dated August 24, 2007, with Corelogic (dba MarketLinx Corp.);

14. An unsigned and undated witness statement from an unidentified former employee of Corelogic in its Burnaby office; and

15. A document entitled "My Written Reasons for the Determination" containing further explanations and evidence disputing the delegate's findings of fact and challenging the facts adduced by Corelogic's witnesses.

23. Do any of these documents qualify as new evidence? It should be noted that in *Re: Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal, in deciding whether or not to accept fresh evidence on appeal of a determination, was guided by the test applied in civil courts for admitting fresh evidence on appeal. The Tribunal went on to describe the test as follows:

> (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) The evidence must be relevant to a material issue arising from the complaint;

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

(d) The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence has led the Director to a different conclusion on the material issue.

24. The four-fold criteria in the test above are a conjunctive requirement and, therefore, any party seeking the Tribunal to admit new evidence on appeal of a determination must satisfy each criterion before the Tribunal will admit the new evidence.

25. In the case of the documents referred to in paragraph 1, while they are not new documents *per se*, they go to Ms. Perera's contention that the delegate "illegally" changed the hearing date. I have, under the heading "Natural Justice" above, considered the said documents and also the documents on the same issue in the Director's record and need not reiterate the matter here.

26. As for the documents in paragraphs 2 and 3 above, again they are not new evidence *per se,* but they are presented by Ms. Perera for two (2) possible reasons. First, to argue that the Industrial Relations Officer never told her about the advisability of Dr. Lui's attendance at the hearing for cross examination and, secondly, to introduce settlement discussions to show Corelogic was prepared to pay some monies to settle the claim at the prehearing stage. With respect to the latter, I have mentioned previously that it is inappropriate for the Tribunal to consider evidence of settlement discussions undertaken by the parties on a without prejudice basis. With respect to the former, to the extent that Ms. Perera is relying upon the documents to show that she was not informed by Ms. Yao of the requirement or advisability of bringing Dr. Lui to the hearing, I have no objection to considering the documents. However, I note that, in the record, the delegate received a letter dated July 20, 2012, from counsel for Corelogic setting out objections of Corelogic to the admissibility of Dr. Lui's note which Ms. Perera was intending to rely upon to support her claim alleging that Corelogic breached section 39 of the *Act*. Counsel also indicated that if the objections to the admissibility of the note were denied, then Corelogic would require Dr. Lui's attendance for cross-examination. I also note that the delegate, by a letter dated July 23 to counsel for Corelogic and copied to Ms. Perera, states that it is Ms. Perera's responsibility to have Dr. Lui available at the hearing to testify. The delegate goes on to state that Ms. Perera was advised in the Branch's Fact Sheet that she may call witnesses and if she chose to rely upon a written statement instead of producing a witness, then that statement may not be admitted in evidence or may be given less weight than if the person who wrote the statement was also available to be cross examined. While Ms. Yao may not have advised Ms. Perera of this, Ms. Perera does not dispute receiving the delegate's said letter. If she had a concern with the timing of the letter and wanted to have Dr. Lui attend at the hearing, she could have sought an adjournment for that purpose, but did not. I do not see any natural justice breaches arising from this.

27. Documents in paragraphs 4, 5, 6, 9, 11, 12 and 13 above are documents that were previously presented by Ms. Perera and appear in the record of the Director; however, they are presented again in the appeal for the purpose of rearguing her case. They are clearly not "new evidence" and do not qualify as new evidence under the first criterion in *Re: Merilus Technologies*, *supra.*

28. While I am unable to find document 7 in the Director's record, it is clinical records of Dr. Albert Lui from January 26, 2010, to May 18, 2010, pertaining to Ms. Perera. These records existed prior to the hearing and could have been produced, with the exercise of due diligence, to the delegate prior to the Determination. It too fails under the first criterion in *Re: Merilus Technologies, supra.*

29. With respect to the document in paragraph 8, the medical letter, dated September 14, 2012, from Dr. Albert Lui, this letter was prepared by Dr. Lui at the request of Ms. Perera after the Determination was made. It is,

with the exception of the date and the last line, identical in all other respects to the July 5, 2012, letter of Dr. Lui Ms. Perera presented and relied upon at the hearing. The newly-created letter simply adds that "she is still taking antihypersensitive to control her blood pressure", whereas the previous letter suggested she was on the said medication in August 2009. This is not new evidence, and she could have presented this evidence at the hearing. She is simply supplementing Dr. Lui's previous statement that may have been unclear or lacking full information. This document, like the previous documents, fails under the first criterion in Re: *Merilus Technologies, supra.*

30. The document in paragraph 10, a summary of unpaid overtime hours for the period June 2011 to December 2011, was prepared by Ms. Perera for the appeal, but the information contained in that document existed prior to the hearing and prior to the Determination and she could have, with due diligence, adduced the document at the hearing previously. I also note that she has provided in one or another form the information contained in this document at the hearing. This document also does not qualify under the first criterion in *Re: Merilus Techologies, supra.*

31. With respect to document 14, this is an unsigned and undated witness statement from an unidentified employee of Corelogic in its Burnaby office describing the work and the general hours Ms. Perera worked in the Burnaby office of Corelogic when he was employed. Ms. Perera could have called this witness at the hearing but did not. The information this witness is giving existed at the time of the hearing and could have been presented to the adjudicator at the hearing, if Ms. Perera called the witness. Leaving aside the issues about the anonymity of the witness who cannot be cross-examined, this is a case of Ms. Perera seeking out more evidence to supplement what she already provided at the hearing because she is dissatisfied with the result of the Determination. In my view, the anonymous statement fails under the first criterion in *Re: Merilus Technologies, supra.* It is important that parties exercise due diligence to present all available relevant evidence during the investigation or adjudicative process before the determination is made and not wait to see how the matter is decided before presenting more evidence. The appeal procedure is not to be used to make the case that should have been made or presented to the delegate during the investigative or adjudicative process.

32. Finally, document 15, entitled "My Written Reasons for the Determination", contains additional explanations and evidence disputing the delegate's findings of fact and challenging the facts adduced by Corelogic's witnesses. This, too, does not qualify as new evidence under the first criterion in *Re: Merilus Technologies, supra.* It is not new evidence but instead it is further re-argument of Ms. Perera and further elucidation of her dispute with the delegate's findings of fact in the Reasons. Throughout this document, Ms. Perera identifies parts of the delegate's summary of the evidence and findings of fact and then goes on to dispute those findings of fact with supplementary arguments and, in some cases, arguments she has already made at the hearing and that have been considered by the delegate in the Reasons. As previously indicated, the Tribunal does not consider appeals based on alleged errors in findings of fact, unless such finding amount to an error of law.

33. In the circumstances, I find that Ms. Perera's appeal has no reasonable prospect of succeeding.

ORDER

34. Pursuant to subsection 114(1)(f) of the *Act*, I dismiss this appeal on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination dated August 31, 2012, is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal