Amendment to Tribunal Decision BC EST # D125/12 of November 22, 2012, in the matter of Deepthi Angela A. Perera ("Ms. Perera")

Pursuant to Section 53 of the Administrative Tribunals Act, S.B.C. 2004, C45 and Rule 14(4)(b) of the Employment Standard Tribunal's *Rules of Practice and Procedure*

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2012A/108

DATE OF DECISION: December 14, 2012

DECISION

SUBMISSIONS

Deepthi Angela A. Perera on her own behalf

OVERVIEW

1. On November 22, 2012, the Tribunal rendered a decision in the appeal (the "Appeal Decision") 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"). On November 23, 2012, the appellant, Ms. Perera, filed an application (the "Application") pursuant to Rule 14(4)(b) of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") to amend my appeal decision made on November 22, 2012, and reported at BC EST # D125/12 (the "Appeal Decision"). Rules 14(4) and (5) of the *Rules* state:

> **Rule 14 Decisions and Orders**
>
> ....
>
> **Amending a final decision**
>
> (4) A party may apply, or the Tribunal may decide on its own, to amend a final decision to correct any of the following:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission, or other similar mistake; or
>
> (c) an obvious arithmetical computation error.
>
> (5) Unless the Tribunal decides otherwise, an amendment will not be made more than 30 days after all parties have been served with the final decision.

2. Rules 14(4) and (5)(b) are also similarly worded to Sections 53(1) and (2) of the *Administrative Tribunal's Act* ("*ATA*") which provide:

> **Amendment to final decision**
>
> 53 (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:
>
> (a) a clerical or typographical error;
>
> (b) an accidental or inadvertent error, omission or other similar mistake;
>
> (c) an arithmetical error made in a computation.
>
> (2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

3. Ms. Perera is well within the time limit set out in both section 53 of the *ATA* and Rule 14 of the *Rules* to make her application for amendment of the Appeal Decision.

4. I will consider Ms. Perera's Application based on her written submissions and I do not require any further submissions from the Director or Ms. Perera's former employer, Corelogic MLS Solutions Canada ULC ("Corelogic").

5. In the Application, Ms. Perera contends that I failed, in the Appeal Decision, to consider Corelogic's employee policy entitled MarketLinx Employee Policy (the "Policy") which she submitted for the first time in her appeal submissions. More precisely or accurately, Ms. Perera did not include the Policy in her originally-filed appeal, but produced it in context of her objection to the completeness of the Director's record stating, in part, that the Director's record was missing the Policy and she only realized this upon her review of the Delegate's letter, dated May 12, 2012, wherein the delegate requested from Corelogic the "conditions of employment". While neither Ms. Perera nor Corelogic produced the Policy during the investigation or at the hearing of Ms. Perera's complaint (the "Complaint") and before the Determination was made, Ms. Perera only produced it when voicing her objection to the completeness of the Director's record in the appeal. While Ms. Perera does not explain why she did not adduce it earlier, before the Determination was made, she states in her appeal submissions "[a]s the employer appears to have not submitted this important document which is missing in the Record, I have attached it with this email for the completeness of the Record ...".

6. While I reviewed the Policy when considering Ms. Perera's appeal, I inadvertently erred in failing or omitting to address my treatment of or decision with respect to the Policy in the Appeal Decision. In this amendment to my Appeal Decision, I propose to rectify that error.

ARGUMENT AND ANALYSIS

7. Whether or not the Tribunal will accept the Policy as "new evidence" in the Appeal, as indicated in the Appeal Decision, is subject to a comprehensive test laid out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In that case, the Tribunal was guided by the following factors applied in civil courts for admitting fresh evidence on appeal:

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

8. The four-fold criteria in the test above, as previously indicated in the Appeal Decision, 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.

9. In this case, with respect to the first criterion, while Corelogic did not produce the Policy or payroll records when the delegate issued a demand for employer records (for which failure Corelogic was levied an administrative penalty of $500), this does not relinquish or mitigate in any way Ms. Perera's independent obligation to make a searching effort for all evidence she wants to rely upon and to produce such information, in a timely fashion, to the delegate during the investigation or at the hearing of her complaint or at least before the Determination was made. She states in her submissions in support of the Application that "I was fully aware of this company policy…". She also states that it was "made available at the office lunch

room as it was the companywide employment policy conditions for Burnaby permanent employees." The Policy clearly existed at the time she lodged her complaint. However, she did not produce the Policy earlier, but only in her appeal of the Determination and only then in context of her objections to the completeness of the record provided by the Director. I am not persuaded that the Policy could not, with the exercise of due diligence, have been discovered by Ms. Perera and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. If there was any impediment to her producing the policy earlier, Ms. Perera has not articulated what that impediment would have been other than she was only reminded about the Policy and "researched and obtained" it as a result of seeing in the appeal record the delegate's letter of May 12, 2012, to Corelogic to produce "conditions of employment". The latter explanation, in my view, does satisfy the first of the fourfold conditions in the test delineated in *Re Merilus Technologies*, *supra.*

10. Due to the conjunctive nature of the requirements in *Re Merilus Technologies*, the failure of Ms. Perera to satisfy the first criterion in the four part test effectively leads me to conclude that the Policy does not qualify as 'new evidence" and therefore it should not be considered.

11. Having said this, I also want to point out that while the Policy may, arguably, be material and credible, it is not of such "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". The material issue is whether Ms. Perera worked hours in excess of 40 per week. While Ms. Perera relies on the passage in the Policy that says "[t]he normal workday for regular full-time employees is from 8:30 a.m. until 5:30 p.m., eight work hours" to argue that the Policy "proves that [she has] worked over 40 hours in a week" and to challenge the evidence of the witnesses of Corelogic whose evidence the Delegate preferred on the subject, Ms. Perera fails to point out that the Policy also states that "[w]ork schedules may vary according to business and customer expectations." The Policy, in my view, does not, absent other supporting evidence before the Director at the time the Determination was made, satisfy the last criterion in the *Re Merilus Technologies* decision to warrant consideration on appeal.

ORDER

12. I find that the Policy is not "new evidence" and I find no reason to change the Appeal Decision reported at BC EST # D125/12.

Shafik Bhalloo
Member
Employment Standards Tribunal