Employment Standards TRIBUNAL

An appeal

- by -

Hygieia Naturals Inc.
("Hygieia")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2009A/123

DATE OF DECISION: December 14, 2009

DECISION

SUBMISSIONS

Greg Pynn	on behalf of Hygieia Naturals Inc.
Susan R. Ostermann	on her own behalf
Glenn Gallins, Q.C.	on behalf of Susan R. Ostermann
Bob Krell	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Hygieia Naturals Inc. ("Hygieia"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), of a determination (the "Determination") that was issued by a Delegate of the Director of Employment Standards (the "Delegate") on May 5, 2009. The Determination found that Hygieia contravened section 58 of the *Act* for failing to pay Susan R. Ostermann ("Ms. Ostermann") annual vacation pay but dismissed the latter's claims for termination pay and for recovery of ferry expenses she allegedly incurred in context of her employment with Hygieia. The Determination ordered Hygieia to pay Ms. Ostermann a total of $1,136.67 in wages, inclusive of $24.47 interest pursuant to section 88 of the *Act*.

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

3. Hygieia, through its director and officer, Mr. Greg Pynn ("Mr. Pynn"), appeals the Determination with respect to the award of annual vacation pay to Ms. Ostermann on all available grounds of appeal under section 112(1) of the *Act,* namely, the "error of law", "natural justice" and "new evidence" grounds of appeal.

4. By way of a remedy, Hygieia is seeking the Tribunal to vary or change the Determination in respect of the annual vacation pay award to "zero".

5. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (pursuant to s. 103) and Rule 17 of the 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.

ISSUES

6. Did the Director err in law or breach the principles of natural justice in awarding vacation pay to Ms. Ostermann?

7. Is there new evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify changing or varying the Determination with respect to the Director's award of annual vacation to Ms. Ostermann?

FACTS

8. Hygieia, at all material times, was in the business of marketing and distribution of natural personal care products and employed Ms. Ostermann as its Operations Manager commencing in spring 2005 until November 28, 2008.

9. Prior to her employment with Hygieia, since about February 17, 2003, Ms. Ostermann was employed as a salesperson with Bliss Natural Products Ltd. ("Bliss"), a company involved in the manufacture and sale of natural toothpaste and a balm.

10. Mr. Pynn was the Director and Manager of Bliss. At some point, he realized that Bliss could not survive simply on the manufacture and sale of its two products and began investigating other business opportunities in the natural personal care product industry in which he could additionally utilize or employ Bliss' sales force.

11. Subsequently, in late 2004, Mr. Pynn entered into a business relationship with Messrs. Sai Mak and Paul Fu ("Messrs. Mak and Fu") who were directors of a very large and successful pharmaceutical distribution company called Asenda. In this business relationship, Messrs. Mak and Fu contributed their experience and established contacts to purchase and warehouse a wide variety of personal natural care products. Mr. Pynn's role initially in this relationship was to provide sales support.

12. Subsequently, on or about November 4, 2004, in the interest of keeping the new business of natural personal care products separate from Asenda's pharmaceutical business, Messrs. Mak and Fu incorporated a separate company, Hygieia, of which they were the directors. Mr. Pynn was not involved in the set up of Hygieia and he was also not its director or officer at its inception. Further, Mr. Pynn did not have any decision-making authority or say in the finances or operations of Hygieia. Mr. Pynn's role was simply to sell Hygieia's products for which he received a commission.

13. Subsequently, in early 2005, Mr. Pynn commenced winding up Bliss' business. The wind-up process required Mr. Pynn to consider termination of Ms. Ostermann's employment. At that time, Mr. Pynn approached Messrs. Mak and Fu with a view to having Hygieia hire Ms. Ostermann based on her experience in the field of buying and selling personal care products. Messrs. Mak and Fu acceded to Mr. Pynn's request and had the latter communicate an offer of employment to Ms. Ostermann. Ms. Ostermann accepted the offer and began employment with Hygieia as its Operations Coordinator in the spring of 2005.

14. Subsequently, some few months after Ms. Ostermann was hired by Hygieia, Asenda was acquired by a large publicly traded American company who was not interested in continuing the personal care product business of Hygieia. As a result, in the fall of 2005, Messrs. Mak and Fu offered Mr. Pynn the business of Hygieia and Mr. Pynn accepted the offer. As a result, Messrs. Mak and Fu resigned as directors and officers of Hygieia and Mr. Pynn replaced them as Hygieia's sole director and officer.

15. Shortly thereafter, Mr. Pynn decided to operate Hygieia without any employees and on November 21, 2008, he caused Hygieia to give Ms. Ostermann working notice of termination of her employment as of December 12, 2008. Ms. Ostermann chose not to work out her notice. Thereafter, on January 16, 2009, Ms. Ostermann filed a complaint against Hygieia alleging that the latter contravened the *Act* by failing to pay her vacation pay, compensation for length of service and reimbursement for a business expense (ferry expense) she incurred in relation to Hygieia's business (the "Complaint").

16. The Delegate investigated the Complaint and held a hearing into the matter on May 5, 2009 (the "Hearing"). The Hearing was attended by both Ms. Ostermann and Mr. Pynn.

17. I do not propose to review the evidence pertaining to Ms. Ostermann's claim regarding termination pay nor her claim relating to reimbursement of ferry expense she incurred as those claims were dismissed and are not the subject of Hygieia's appeal. The only claim that is disputed in Hygieia's appeal is the award of vacation pay made to Ms. Ostermann.

18. With respect to the vacation pay claim, the Delegate, in the Determination, significantly relies upon an email dated October 1, 2008, (the "Reay Email") from Hygieia's Director of Operations, Mr. David Reay ("Mr. Reay") to Ms. Osterman, which was copied to Mr. Pynn. Ms. Ostermann introduced the Reay Email at the Hearing and it contains a representation from Hygieia or its representative, Mr. Reay, to Ms. Ostermann about her vacation entitlement. The Reay Email is produced verbatim below:

> **From:** David Reay
> **Sent:** Wednesday, October 01, 2008 3:22 PM
> **To:** Susan Ostermann
> **Cc:** Greg Pynn
> **Subject:** FW: Individual vacation time
> **Attachments:** Ostermann, Susan vacation time.doc
>
> Susan,
>
> Here is the vacation status you requested. As noted in the document you carried over 7 days into 2007. Going forward from 2007 here is the tally.
>
> 7 days – balance forward from 2006
> 14 days – 2007 vacation earned
>
> 21 days – 2007 total available
> 15 days – 2007 vacation used
> 6 days – balance forward from 2007
> 11.25 days – vacation earned for 9 months in 2008
> 17.25 – total vacation available in 2008
> 9 days – 2008 vacation used
> 8.25 – vacation remaining

19. The Reay Email communicates to Ms. Ostermann that she was entitled to 8.25 vacation days as of September 30, 2008.

20. As indicated, Mr. Pynn was copied the Reay Email. He did not express any concern or disagreement with the calculation of outstanding vacation entitlement of Ms. Ostermann in the Reay Email to either Mr. Reay or Ms. Ostermann.

21. The Delegate also notes in the Determination that Ms. Ostermann, in addition to Mr. Reay's calculation of outstanding vacation pay of 8.25 days, claimed an additional 2 ½ days of vacation entitlement (less one day she took) for work she performed for Hygieia between September 30, 2008 and her last day of employment with Hygieia on November 27, 2008. This totalled 9.75 days of vacation entitlement. However, at the Hearing, Ms. Ostermann confirmed that she took an additional three days of vacation and thus she was owed vacation pay for 6.75 days at the wage rate of $164.77 per day for a total of $1,112.20.

22. The Delegate also noted that Ms. Ostermann adduced into evidence at the Hearing a copy of an email dated February 27, 2007 (the "Vickery Email") from Mr. Pynn's then assistant, Ms. Dorothea Vickery ("Ms. Vickery") to Mr. Reay attaching a "draft" vacation policy which provided that Hygieia employees would

receive 10 working days of vacation per year, plus one additional day "added each year". This email is reproduced verbatim below:

> **From:** Dorothea & George Vickery [mailto:dvickery@shaw.ca]
> **Sent:** Wednesday, February 21, 2007 6:26 PM
> **To:** David Reay
> **Subject:** Individual vacation time
>
> Hi David: see attached for Susan.
>
> Draft policy – Entitlement: 80 hours (10 working days) plus 8 hrs: (1 day) added each year. Benefits may be taken before fully earned for that year - with approval of course.

23. The Vickery Email indicates, in the case of Ms. Ostermann, she was entitled to 10 working days of vacation per year, plus one additional day for each year. The Delegate, in the reasons for the Determination, notes that "although no evidence exists to know exactly how Mr. Reay calculated Ms. Ostermann's vacation entitlements, it does appear Mr. Reay used this policy and credited Ms. Ostermann with time worked for Bliss when performing his vacation pay reconciliation".

24. On the part of Hygieia, Mr. Pynn submits that since Ms. Ostermann's employment with Bliss was not connected to her employment with Hygieia, Ms. Ostermann's entitlement to annual vacation pay under Section 58 of the *Act* should be based on three years of employment (i.e. from Spring 2005 to November 28, 2008). Effectively, Mr. Pynn is arguing that Ms. Ostermann's vacation pay is two weeks pay at the rate of 4% under section 57(1)(a) and not three weeks vacation at the rate of 6%. He states, in the circumstances, no further vacation is owed to Ms. Ostermann.

25. Mr. Pynn further submits that Mr. Reay incorrectly calculated Ms. Ostermann's vacation for 2007 and 2008 because Hygieia never agreed to the draft vacation policy. However, notes the Delegate, Mr. Pynn admitted receiving the Reay Email containing Ms. Ostermann's vacation calculations and while he says he never agreed with those calculations, he also did not express his disagreement with them to Mr. Reay or Ms. Ostermann.

26. The Delegate, in analysing the matter of the length of Ms. Ostermann's employment, in the Determination, examines the question of whether or not Bliss and Hygieia were associated corporations under section 95 (associated corporations) of the *Act* such as to bridge her periods of employment between the two employers. After reviewing all the evidence submitted by the parties, the Delegate concluded that Bliss and Hygieia were not associated corporations at the material time of the termination of Ms. Ostermann's employment with Bliss and the commencement of her new employment with Hygieia. In particular, the Delegate notes that Bliss and Hygieia were not under common direction and control. Mr. Pynn was not a director of Hygieia and did not have any standing in Hygieia at the time Ms. Osterman's employment was terminated with Bliss and she started employment with Hygieia, notwithstanding a mutually beneficial relationship between the two companies.

27. Furthermore, the Delegate also notes that the alternate basis on which Ms. Ostermann's employment could be bridged between Hygieia and Bliss, namely, under section 97 (sale of a business or assets) of the *Act*, is also unsupported in evidence at the Hearing. The Delegate notes that the business of Bliss was to produce and sell toothpaste and balm and while there is evidence that the latter continued to sell its balm through Hygieia's sales network and catalogue, there was no evidence to suggest Bliss disposed of and Hygieia acquired the balm or benefited from Bliss' balm product. According to the Delegate, for section 97 of the *Act* to operate, it is essential that at least part of Bliss' business was disposed of to Hygieia and this did not happen. In the circumstances, the Delegate concluded that neither section 95 nor section 97 operate to

bridge Ms. Ostermann's employment between Bliss and Hygieia. Therefore, for the purposes of the *Act*, the Delegate concluded that Ms. Ostermann's employment with Hygieia was from Fall of 2005 until November 28, 2008 (between three and four years).

28. Having determined that Ms. Ostermann's employment with Hygieia was from the Fall of 2005 to November 28, 2008, the Delegate then went on to consider section 58 of the *Act* and noted that it contemplates employment contracts that provide for greater entitlement than the minimum vacation pay under the *Act*. In the present case, the Delegate noted that the issue was not what the *Act* required or dictated vacation entitlement should be in Ms. Ostermann's case, but what the agreed terms of Ms. Ostermann's employment contract with Hygieia provided. According to the Delegate, based on "what responsible individuals within the company (Mr. Reay) communicated with Mr. Pynn's knowledge" to Ms. Ostermann and based on Mr. Pynn's confirmation that he understood "what had been communicated by Mr. Reay and Ms. Vickery" to Ms. Ostermann, Ms. Ostermann was entitled to the vacation pay she claimed "because there [was] cogent and reliable evidence that her entitlement as claimed was a term of her employment". As a result, the Delegate awarded Ms. Ostermann annual vacation pay based on 6.75 days owing to her at the daily wage rate of $164.70, for a total of $1, 112.20 plus accrued interest pursuant to section 88 of the *Act*.

SUBMISSIONS OF HYGIEIA

(i) Error of Law

29. Under this ground of appeal, Hygieia is challenging as wrong the Delegate's conclusion that there was cogent and reliable evidence to conclude that Hygieia agreed to pay vacation entitlement greater than provided under the minimum standards of the *Act*. According to Hygieia, Ms. Ostermann was entitled and fully paid her vacation entitlement based on the minimum standards set out under the *Act*. Hygieia contends that the draft vacation policy, which was sent to Mr. Pynn and Mr. Reay in the Vickery Email, was not the effective vacation policy of Hygieia and that "no employees at Hygieia … received more than the vacation entitlement as set out in the labour standards act".

30. Mr. Pynn further submits that the Delegate "failed to realize that Mr. Reay had just lost his job when he sent [him] his calculation of Ms. Ostermann's vacation entitlement". Mr. Pynn further contends that Mr. Reay's said calculations were biased based on Mr. Reay's close personal friendship with Ms. Ostermann. Having said this, Mr. Pynn acknowledges that he knew that Mr. Reay's calculations were incorrect when he received the Reay Email, but he decided that "there was little benefit in discussing the matter" with Mr. Reay who had "just lost his job".

(ii) Natural Justice

31. Under this ground of appeal, Hygieia argues that the Delegate breached the principles of natural justice in making the Determination because, in calculating Ms. Ostermann's vacation entitlement, he improperly included her period of employment at Bliss, an unrelated company to Hygieia. According to Hygieia, this "in effect allows an employee (Ms. Ostermann in this case) to receive an entitlement based on a bias and incorrect calculation".

32. Hygieia also notes that Ms. Ostermann's 2007 vacation entitlement in the Reay Email was stated to be 14 days although the challenged draft vacation policy limits that entitlement to 10 days.

33. Hygieia further argues under the natural justice ground of appeal that the Delegate's statement in the Determination that "although no evidence exist to know exactly how Mr. Reay calculated Ms. Ostermann's

vacation entitlements, it does appear Mr. Reay used this policy and credited Ms. Ostermann with time worked for Bliss when performing his vacation pay reconciliation" indicates that there was no cogent and reliable evidence that Ms. Ostermann was promised any vacation entitlement whatsoever.

(iii) New Evidence

34. With respect to the new evidence ground of appeal, Hygieia submits that Ms. Vickery was "the author of the draft vacation policy email" and because she was experiencing "several personal and family illnesses" during the process leading to the Determination, she was unable to provide her evidence at the Hearing. Hygieia states that she is now willing to provide evidence supporting Hygieia's position, namely, that the "draft policy" was nothing more than a "draft policy" and not in effect at Hygieia.

35. In addition, Mr. Pynn also wishes to adduce further evidence of Hygieia's policy regarding vacation entitlement through production of "several employment contracts with staff" which purportedly would show that Hygieia only paid the minimum vacation entitlement under the *Act* and nothing more.

SUBMISSIONS OF THE DIRECTOR

36. The Delegate submits that the "Determination speaks for itself" and that Hygieia's attempt to introduce evidence from Ms. Vickery including evidence of any friendship that may have existed between Ms. Ostermann and Mr. Reay is not evidence that was unavailable at the time of the Hearing and it was not submitted at the Hearing and should not be considered in the appeal of the Determination

SUBMISSIONS OF THE RESPONDENT MS. OSTERMANN

(i) Error of Law

37. With respect to Hygieia's contention that there is no cogent and reliable evidence to suggest that Hygieia agreed to pay vacation entitlement in excess of the minimum in the *Act*, counsel for Ms. Ostermann states that the Reay Email constitutes evidence of communication to Ms. Ostermann that she had a vacation entitlement greater than the minimum required under the *Act* and the Director's reliance on the said email in determining there was "cogent and reliable evidence" that Ms. Ostermann had vacation entitlement beyond the minimum delineated in the *Act* is a finding of fact and not law.

38. Counsel further submits that Hygieia, in suggesting bias on the part of Mr. Reay in calculating Ms. Ostermann's entitlement because she was a personal friend of his and he had lost his employment with Hygieia, "is admitting that they did communicate to Ms. Ostermann that she had a significant vacation entitlement, but are arguing that they did not truly mean it".

39. Counsel also submits that there is no evidence to support the inference of bias or any motivation on the part of Mr. Reay to inflate Ms. Ostermann's vacation entitlement beyond what she was actually owed because of any friendship between them or his loss employment with Hygieia. Counsel also denies that there was "a close and personal friendship" between Ms. Ostermann and Mr. Reay, although he admits the two "did have an amicable working relationship".

40. Counsel notes that while Hygieia admitted that it was aware of the representation made to Ms. Ostermann pertaining to her vacation entitlement in the Reay Email and Mr. Pynn thought it "would be of little benefit discussing the matter with Mr. Reay given he had just lost his job", Hygieia offers no explanation why it did not discuss the matter with Ms. Ostermann as soon as practicable.

41. Counsel further submits that the representation of Hygieia to Ms. Ostermann that she had vacation entitlement greater than under the *Act* is a finding of fact for which there was cogent and reliable evidence, namely, the Reay Email. In the circumstances, counsel argues that there is no basis for an appeal under the error of law ground.

(ii) Natural Justice

42. Counsel challenges the characterization of Hygieia's argument under the natural justice ground of appeal that the Director improperly allowed the calculation of Ms. Ostermann's vacation entitlement to include time employed for an unrelated company, Bliss, thereby allowing Ms. Ostermann to receive "an entitlement based on a bias and incorrect calculation", as more properly or best premised as an error of law and proposes to address it as such. More specifically, counsel submits that the Director did not err in law in concluding Ms. Ostermann's vacation entitlement may have included consideration of her period of employment with Bliss. According to counsel, the fact that Bliss was found to be an unrelated company was not a relevant factor in determining the amount of vacation entitlement Ms. Ostermann was owed. Instead, states counsel, the Director made, as a finding of fact, a determination of what was communicated to Ms. Ostermann by Hygieia (by way of the Reay Email) and calculated her entitlement based accordingly.

43. Counsel also points out that the Director noted in the Determination that employers could agree to higher vacation entitlements and if they do, they may be bound by their agreements under the *Act*. In the present case, counsel argues that Hygieia was free, although not obligated, to include Ms. Ostermann's time at Bliss in determining her vacation entitlements and that is what Hygieia opted to do when it communicated to her in the Reay Email her vacation entitlement. Therefore, argues counsel, Hygieia bound itself to that arrangement.

44. In response to Hygieia's contention that in the Vickery Email Ms. Ostermann's vacation entitlement for 2007 was limited to 10 days but the Reay Email shows her receiving 14 days, counsel submits that the policy outlined by Ms. Vickery allows for increasing yearly vacation entitlement based on time of service (one extra day per year). Counsel further argues that while not explicitly found in the evidence, the Director suggested in the Reasons for the Determination a reasonable inference that Mr. Reay's calculation for the 2007 vacation entitlement included this measure of extra entitlement based on Ms. Ostermann's previous service to Bliss. Counsel also illustrates this by showing how the application of the vacation policy could lead to the 14 days vacation entitlement for 2007. Counsel for Ms. Ostermann further notes that the Vickery Email (sent to Mr. Reay) had an attachment whereby she calculated Ms. Ostermann's vacation entitlement to be 14 days for 2007 as well.

45. Counsel for Ms. Ostermann further submits that while Hygieia was not obligated to include her service at Bliss and give her extra vacation entitlement based on that service, they were free to voluntarily contract to do so and in fact did so as evidenced in the Reay Email communicated to Ms. Ostermann.

46. Counsel further submits that the finding in the Determination that Bliss and Hygieia were unrelated companies is not material or relevant to determining Ms. Ostermann's vacation entitlement as her entitlement was not based on the *Act* but on the terms of her employment agreement which, as evidenced in the Reay Email communicated to her, provided Ms. Ostermann greater than the minimum vacation entitlement in the *Act*.

47. Counsel further submits that the Director made a finding of law that vacation entitlement Ms. Ostermann was promised above and beyond that found in section 58 of the *Act* can bind an employer and be enforced under the *Act* as a term of the employment contract. Counsel notes that Hygieia did not challenge that finding.

48. Counsel also reiterates that the amount of entitlement promised to an employee as part of their employment contract is a finding of fact, and an employer is permitted to promise entitlement based on whatever criteria they desire so long as it meets the statutory minimum. In the case at hand, counsel states that Hygieia, as a matter of fact, represented to Ms. Ostermann, through the Reay Email, that she was owed vacation in part based on her period of employment with Bliss and this is not an error in law in holding Hygieia to that representation.

(iii) New Evidence

49. With respect to the new evidence ground of appeal, and more specifically Hygieia's intention to call at this stage Ms. Vickery to support its position that the draft vacation policy was intended to be only a draft and was not in effect at Hygieia and that all employees only received the minimum vacation entitlement under the *Act*, counsel states that if the purported evidence were true it would not change Ms. Ostermann's vacation entitlements. More specifically, counsel states that Hygieia accepts both that Mr. Reay represented to Ms. Ostermann her vacation entitlements including the policy used to calculate those entitlements (in the Reay Email) and Mr. Pynn was aware and understood that this had happened. The fact that Ms. Vickery only intended the policy to be a draft or that Mr. Pynn did not want vacation for Ms. Ostermann calculated based on this policy is irrelevant, as it has no bearing whatsoever on the contents of the representations made to Ms. Ostermann, according to counsel. Counsel also argues that if Mr. Pynn did not want the representations made to Ms. Ostermann (in the Reay Email) pertaining to her vacation entitlement made to her because they were incorrect then he should have informed Ms. Ostermann of the error in a timely manner. Instead, counsel states, Hygieia conveyed to Ms. Ostermann her vacation entitlement a year and a half after the policy was initially developed and never communicated to her any other basis for her vacation entitlement.

50. With respect to the second basis for Hygieia's new evidence ground of appeal, namely, its desire to adduce contracts of other employees to support its position that it only provides employees vacation based on the minimum requirements of the *Act*, counsel argues that this purported evidence does not modify the representations Hygieia made to Ms. Ostermann by Mr. Reay with Mr. Pynn's knowledge. Counsel further states that whether or not Ms. Vickery or Mr. Pynn agreed with the draft vacation policy, and whether or not Hygieia used that policy in determining the vacation entitlement of any other Hygieia employees is irrelevant to the Delegate's finding that "responsible individuals within the company" communicated to Ms. Ostermann vacation entitlements beyond the statutory minimum. In the circumstances, counsel states that the Director was free to find, as a matter of fact, that those representations formed part of the employment contract of Ms. Ostermann with Hygieia and the latter should be held to those representations.

HYGIEIA'S REPLY SUBMISSIONS

51. In response to submissions of counsel for Ms. Ostermann, Hygieia submitted a reply, which largely argues why Ms. Vickery should be allowed the "opportunity to give evidence and explain the truth of her draft email" (sic). I have read the submissions very carefully and considered them but do not find it necessary to set them out here except to say that they suggest what Ms. Vickery would say if she testified and much of it is repetitive and not a proper reply.

52. Hygieia also submits that Ms. Vickery mistakenly thought that Ms. Ostermann worked full time when she did not work full time and therefore the draft policy that refers to 10 vacation days would not have applied to her (if it were found to be in effect) as it would have governed full-time staff. Again this is not in the nature of a proper reply and it is not a responsive reply to the submissions of counsel for Ms. Ostermann.

53. I also note that in the reply submissions, Mr. Pynn again infers bias and impropriety on the part of Mr. Reay in preparing the Reay Email setting out Ms. Ostermann's vacation entitlement. This again is a re-argument of previous submissions and not a proper reply.

ANALYSIS

54. I have reviewed the Determination, the section 112(5) "record" and the submissions of the parties and I propose to examine each ground of appeal of Hygieia under separate subheadings below.

(i) Error of Law

55. As previously noted, under the error of law ground of appeal, Hygieia is challenging as wrong the Delegate's conclusion that Hygieia agreed to pay vacation entitlement greater than provided under the minimum standards of the *Act*. According to Hygieia, there is "no cogent and reliable evidence to suggest that Hygieia agreed to pay vacation entitlement beyond the [Act]" to Ms. Ostermann.

56. Before considering whether Hygieia's submission above is supported in evidence, the Tribunal needs to consider whether the submission*, prima facie*, properly invokes the error of law ground of appeal. In this regard, I note that the Tribunal has consistently adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A):

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

57. Based on the definitions of error of law in *Gemex*, Hygieia's submission may be considered or examined under the error of law ground of appeal in context of whether the Delegate acted without any evidence or acted on a view of facts that could not reasonably be entertained. Having said this, I find that it was open to the Delegate to reasonably accept or construe the Reay Email as "cogent and reliable evidence" that Ms. Osterman had vacation entitlement beyond the minimum delineated in the *Act*. I think it is also an important part of the evidence going to the determination of the Delegate that Ms. Osterman was owed vacation entitlement based on the Reay Email that the said email was copied to and received by Mr. Pynn, who did nothing to address the purported inaccuracies in the vacation calculation he claims. While I do not find Mr. Pynn's reason for not bringing the purported inaccuracies in the vacation calculations to Mr. Reay's attention because the latter's employment was terminated by Hygieia, I do not see why Mr. Pynn would not have brought the matter up with Mr. Ostermann as soon as practicable.

58. In sum, I find that this is not a case of the Delegate acting without any evidence or on a view of the facts that could not be reasonably entertained.

59. As concerns Hygieia's challenge of Mr. Reay's calculation of Ms. Ostermann's vacation entitlement as inaccurate because he was biased as a close a personal friend of Ms. Ostermann and also because his employment was terminated by Hygieia, I find no evidentiary basis for such allegations. In my view, if Hygieia intended to challenge Mr. Reay's calculations by challenging his integrity and motivation then Hygieia

should have done so at the Hearing of the Complaint in the first instance. It is inappropriate to make such a challenge for the first time on appeal of the Determination. Moreover, I do not find that this challenge is properly characterized as an error of law in any event but I simply deal with it under this head as Hygieia raised it in context of the error of law ground of appeal.

(ii) Natural Justice

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

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

61. The crux of Hygieia's argument under the natural justice ground of appeal is that the Delegate allowed a calculation of vacation entitlement to include the time Ms. Ostermann was employed for Bliss, an unrelated company to Hygieia. According to Hygieia this allowed Ms. Ostermann to receive an entitlement based "on a bias and incorrect calculation". If the reference to "bias" in Hygieia's submission is made in relation to the allegation of bias levelled against Mr. Reay which I dealt with and disposed of previously as baseless then it is improperly raised under the natural justice ground of appeal. If, however, the reference to bias is referring to the Delegate's decision-making in the Determination then I find that it is also without any evidentiary foundation and I would dismiss it.

62. Having said this, I note that I find persuasive and accept the submissions of counsel for Ms. Ostermann that while Bliss was found to be unrelated to Hygieia in the Determination, this finding was not a relevant factor in determining the amount of vacation entitlement Ms. Ostermann was owed. As indicated by the Delegate in the Determination, Section 58 of the *Act* contemplates employment contracts that provide for greater vacation entitlements than the minimum provided under the *Act*. In this case, I agree with the Delegate that the issue was not what the *Act* required but rather what the terms of Ms. Ostermann's employment with Hygieia required. Having noted that employers, under Section 58 of the *Act*, can agree to a higher vacation entitlement and be bound by those agreements under the *Act*, it was open to Hygieia to provide Ms. Ostermann more than the minimum vacation entitlement under the *Act* by including her time at Bliss in determining her vacation entitlement. This Hygieia did in the case of Ms. Ostermann and Hygieia also communicated it to Ms. Ostermann in the Reay Email and therefore, in my view, bound itself to that arrangement.

63. I also agree with counsel for Ms. Ostermann that while the Reay Email does not "step by step" explain how Mr. Reay came to determine Ms. Ostermann's vacation entitlement, there is a vacation policy attached to that email that appears to have been followed. The calculation seems to be consistent with this policy based on Hygieia's consideration of the period of Ms. Ostermann's employment with Bliss.

(ii) New Evidence

64. Hygieia, under this ground of appeal, wishes to call Ms. Vickery as a witness in the appeal. Hygieia claims that her evidence would support its position that the draft vacation policy was not the policy in effect at

Hygieia and neither Ms. Vickery nor Mr. Pynn intended it to be the vacation policy for calculating Ms. Ostermann's vacation entitlement.

65. Additional "new evidence" Hygieia wishes to adduce under this ground of appeal is "several employment contracts with staff" to show that Hygieia only paid the minimum entitlement set out under the *Act* to its employees.

66. The criteria for allowing new evidence on an appeal of a determination is delineated by the Tribunal in *Re: Merilus Technologies Inc.*, BC EST. # D171/03 and comprises of the following:

- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- The evidence must be relevant to a material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

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

68. In the present case I am not convinced that Hygieia has met the first criterion in *Re: Merilus* test with respect to its request to call Ms. Vickery as a witness now. While Hygieia states that Ms. Vickery was "going through several personal and family illnesses, and was not involved in providing evidence" at the Hearing in this matter, Hygieia has not explained what, if any, efforts it made to contact or call Ms. Vickery during the investigation of the Complaint, or to call her as a witness at the Hearing or to get her evidence before the Delegate at least before the Determination was made.

69. There is also no indication in the materials Hygieia submitted to the Delegate during the investigation of the Complaint (which comprise part of the section 112 "record") that Hygieia had any intention to call Ms. Vickery at the Hearing. In the circumstances, I am not, on a balance of probabilities, persuaded that Ms. Vickery's evidence could not have, with the exercise of due diligence, been presented to the Delegate during the investigation or adjudication of the Complaint or at least prior to the Determination being made.

70. Hygieia having failed on the first criteria of the *Re: Merilus* test, I am not required to and do not need to go any further and subject the purported new evidence of Ms. Vickery to the remaining tests in *Re: Merilus* case.

71. With respect to Hygieia's intention to adduce "several employment contracts with staff" to support its view that Hygieia only paid the minimum entitlement set out under the *Act* to its employees, I note that Hygieia has again not proffered any reason why it did not adduce this evidence during the investigation of the Complaint or at the Hearing or at least before the Determination was made. It is also not the sort of evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made. Accordingly, Hygieia again fails on the basis of the first criterion in the *Re: Merilus* test. In the circumstances, I reject Hygieia's appeal on the new evidence ground of appeal as well.

ORDER

72. Pursuant to Section 115 of the *Act*, I order the Determination dated August 13, 2009, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal