

An appeal

- by -

Triple Nine Group Holdings Ltd. carrying on business as Surrey Husky Market  
(“Triple Nine”)

- 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.:** 2015A/136

**DATE OF DECISION:** December 29, 2015

## DECISION

### SUBMISSIONS

Daljit Toor on behalf of Triple Nine Group Holdings Ltd. carrying on business as Surrey Husky Market

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Triple Nine Group Holdings Ltd. carrying on business as Surrey Husky Market (“Triple Nine”), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 14, 2015 (the “Determination”).
2. The deadline to file the appeal of the Determination was October 22, 2015. However, the day before the deadline, on October 21, 2015, the Tribunal received Triple Nine’s Appeal Form seeking between three (3) to four (4) weeks’ time extension of the appeal deadline, so that a request could be made to the delegate for the transcript of the hearing leading to the Determination.
3. The Determination found that Triple Nine contravened Part 3, section 16 (employer is required to pay minimum wage), section 17 (paydays), section 18 (payment of wages upon termination), section 27 (wage statements); Part 4, section 33 (split shifts), section 40 (overtime wages); Part 5, section 45 (statutory holiday pay); Part 7, section 58 (annual vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Yashdev Singh Rana (“Mr. Rana”), and ordered Triple Nine to pay Mr. Rana wages in the amount of \$11,185.97, including accrued interest under section 88 of the *Act*.
4. The Determination also levied administrative penalties of \$4,000.00 under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) for contraventions of sections 16, 17, 18, 27, 33, 40, 45, and 63 of the *Act*.
5. The total amount of the Determination is \$15,185.97.
6. Triple Nine has appealed the Determination, alleging the Director failed to observe the principles of natural justice in making the Determination, and seeks the Employment Standards Tribunal (the “Tribunal”) to either cancel the Determination or refer it back to the Director.
7. In correspondence, dated October 23, 2015, the Tribunal sent Triple Nine’s appeal to Mr. Rana and the Director for informational purposes only, and advised them that no submissions were being sought from them at this time. In the same correspondence, the Tribunal requested Triple Nine to submit its written reasons and argument for the appeal, including any supporting documents, no later than November 6, 2015. The Tribunal also requested the Director to provide the section 112(5) “record” (the “Record”) that was before the Director at the time the Determination was made.
8. On November 6, 2015, the Tribunal received Triple Nine’s written reasons and argument for the appeal, which the Tribunal then sent to Mr. Rana and to the Director.

9. On November 10, 2015, the Tribunal sent Triple Nine the Record adduced by the Director and afforded Triple Nine the opportunity to object to its completeness. Triple Nine did not raise any objection to the Record's completeness and, accordingly, the Tribunal accepts the Record as complete.
10. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal, the written submissions of Triple Nine, and the Record consisting of the material that was before the Director when the Determination was being made. Under subsection 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of the appeal, without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Rana will, and the Director may, be invited to file further submissions. Triple Nine will then be afforded an opportunity to make a final reply to these submissions, if any. Conversely, if it is found that the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

### ISSUE

11. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

### THE FACTS

12. The facts delineated below are based on the summary of the facts found in the Reasons.
13. Triple Nine operates a full-service gas station with associated services including a car wash and detailing, a laundromat, ATM access, convenience store, two (2) internet stations, propane, photocopy and fax, and acts as a Western Union money transfer agent.
14. Pursuant to the BC Online: Registrar of Companies – Corporation Search conducted by the delegate on November 12, 2014, Triple Nine was incorporated on April 29, 1999, with Kiran Toor listed as its director and an officer. The search also listed Daljit Toor ("Mr. Toor") and Robin Toor as its officers.
15. Triple Nine employed Mr. Rana from May 4, 2014 to October 14, 2014.
16. On November 10, 2014, Mr. Rana filed a complaint against Triple Nine under section 74 of the *Act* alleging that the latter contravened the *Act* by failing to pay him regular wages, overtime, vacation pay, compensation for length of service and statutory holiday pay (the "Complaint").
17. When Mr. Rana was hired by Triple Nine, he was given the title of General Manager with the understanding that he would work evenings and throughout the night. However, after he was hired, Mr. Rana informed Triple Nine that he was not able to work at night due to a medical condition and could only work during the daytime and evenings.
18. None of the terms of Mr. Rana's employment with Triple Nine were documented, as there was no written contract of employment.
19. Triple Nine provided Mr. Rana on-the-job training for a period of approximately one and one-half months, during which he learned all the services provided by the business. The training and instruction he received came from Triple Nine's Manager, Rajinder Sran ("Ms. Sran"), who also controlled Mr. Rana's work schedule.

- Ms. Sran was also responsible for recommending Mr. Rana to Mr. Toor for employment with Triple Nine at its gas station.
20. In the General Manager position, Triple Nine expected or required Mr. Rana to be on call 24 hours a day, seven (7) days a week to assist other staff with any business-related emergencies and to act as additional help as required. As a result, Mr. Rana often worked extended hours in the split shifts he worked.
21. During his period of employment with Triple Nine, Mr. Rana was paid at a rate of \$2,000.00 once per month.
22. Triple Nine considered Mr. Rana to be a manager, as defined under the *Act*, and, therefore, did not pay him overtime or statutory holiday pay.
23. On October 14, 2014, as a result of an exchange between Mr. Rana and Ms. Sran, which the latter found disrespectful and thus reported to Mr. Toor, Mr. Toor directed Mr. Rana to leave the workplace. Thereafter, Mr. Rana did not return to work, and Triple Nine did not attempt to contact him to issue disciplinary measures or to confirm his employment status with Triple Nine, nor did Triple Nine formally terminate his employment.
24. On March 24, 2015, a delegate conducted a hearing into the Complaint (the “Hearing”). Mr. Toor attended at the Hearing on behalf of Triple Nine, and both he and Ms. Sran provided evidence on Triple Nine’s behalf. Mr. Rana attended with his advocate, Gurpreet Singh Pabla, and gave evidence.
25. At the Hearing, the delegate considered the following six (6) questions:
- (i) Was Mr. Rana a manager?
  - (ii) If Mr. Rana was not a manager, what were his hours of work?
  - (iii) What was Mr. Rana’s wage rate?
  - (iv) Is Mr. Rana owed regular wages, overtime or statutory holiday pay?
  - (v) Is Mr. Rana owed compensation for length of service?
  - (vi) Is Mr. Rana owed vacation pay?
26. The parties were afforded an opportunity to provide evidence on each of these questions and did so. The delegate summarizes the parties’ evidence at pages R3 to R7 inclusive of the Reasons before proceeding to delineate his findings and conclusions on each question.
27. With respect to the first question, whether or not Mr. Rana was a manager, the delegate considered the definition of “manager” in section 1 of the *Act*, and explained that an individual’s job title and method of remuneration are not always determinative of whether or not the individual is a manager. Instead, the delegate notes that one needs to properly assess the duties performed by the individual in relation to the nature of the business to determine if the individual is carrying out a managerial level of authority and responsibility.
28. Having said this, the delegate went on to conclude that Mr. Rana was not a manager within the meaning of the *Act* for the following reasons:

The issue is whether his principal employment duties consisted of supervising or directing human or other resources. The Complainant performed some of the functions of a manager including the

supervision and direction of subordinate employees; however, the majority of his time was spent doing routine tasks and duties similar in nature to any other employee. There was no evidence he was delegated any fundamental managerial authority such as hiring or firing, scheduling, business planning or fiscal responsibilities. The nature of his on-call status was to deal with issues that could not effectively be dealt with by part-time staff. Similarly, the information transmitted by the Complainant via the routine work order book does not constitute managerial authority or direction in itself but rather was a means by which to pass information essential to the business operation onto other employees.

At times, the Complainant was left to supervise only one or two other employees or was the only employee on shift. The Employer also testified that the Complainant's hours were expected to be limited from 9 a.m. to 5 p.m. daily on days when Ms. Sran was also working. It is unlikely that two managers would be required to supervise the small number of staff and the presence of a second manager was redundant given the scope of business operations. Accordingly, I find that Mr. Rana was not a manager as defined by section 1 of the Regulation, and as such Mr. Rana is not excluded from Parts 4 and 5 of the Act and is entitled to overtime and statutory holiday pay.

29. With respect to the second question of what were Mr. Rana's hours of work, the delegate noted that section 28(2) of the *Act* provides that employers are required to keep records of all employees' hours of work, regardless of how they are paid or what work they perform. In this case, Triple Nine did not produce any payroll records or records of hours worked by Mr. Rana, because Triple Nine submitted that the records had been stolen from its place of business. In the circumstances, the delegate relied on Mr. Rana's evidence as the best evidence, as it was the only evidence available of the hours Mr. Rana worked. Although the delegate noted that there were some minor discrepancies in Mr. Rana's daily records and monthly summaries of hours, all records Mr. Rana provided were later "substantiated" by the Western Union transaction records that Triple Nine produced covering Mr. Rana's period of employment.
30. Based on the foregoing evidence, the delegate constructed a table summarizing Mr. Rana's weekly total of hours worked at pages R8 and R9 of the Reasons, and used that summary to later determine what regular wages, overtime and statutory holiday pay Mr. Rana was owed by Triple Nine.
31. With respect to the third question pertaining to Mr. Rana's wage rate, the delegate noted that section 16(1) of the *Act* provides that an employer must pay an employee a rate of pay that meets or exceeds the minimum wage rates delineated in the *Regulation*. Mr. Rana was paid a gross total of \$10,000.00 (\$2,000.00 X 5 months) while employed by Triple Nine. Based on the number of hours Mr. Rana worked, his effective rate of pay (without considering his overtime work) was \$6.51 per hour, which the delegate concluded fell far short of the minimum wage rate of \$10.25 per hour then in effect. In the circumstances, the delegate concluded that Triple Nine failed to pay Mr. Rana at least minimum wage and thereby contravened section 16 of the *Act*, and issued an administrative penalty of \$500.00 against Triple Nine for the said breach. The delegate also ordered Triple Nine to pay Mr. Rana the minimum wage rate of \$10.25 per hour.
32. The delegate, next, determined what regular wages and overtime was owed to Mr. Rana by Triple Nine based on the minimum wage rate of \$10.25 per hour. Based on the uncontested wage statements provided by Mr. Rana, Triple Nine paid him \$2,000.00 gross for each of the five (5) months of his employment, for a total of \$10,000.00. Based on the regular hours he worked, the delegate calculated that Mr. Rana earned \$9,184.00 in regular wages and, therefore, he was not owed any more in regular wages.
33. However, with respect to overtime pay, the delegate noted that section 40 of the *Act* requires an employer to pay an employee who works more than eight (8) hours in a day one and one-half times their regular rate of pay for any time worked over eight (8) hours and up to twelve (12) hours in a day, and two times their regular rate of pay for any time worked over twelve (12) hours in a day. The delegate observed that the wage

statements provided by Mr. Rana did not indicate any overtime wages were paid to him for any overtime he worked. Based on Mr. Rana's records (which the delegate previously accepted as the best evidence of hours Mr. Rana worked), the delegate concluded that the latter earned \$9,880.62 in overtime wages. The delegate offset \$816.00 of the regular wages Mr. Rana was overpaid against the outstanding overtime wages he was owed and went on to conclude that Triple Nine owed Mr. Rana overtime wages of \$9,064.62, and so ordered Triple Nine to pay Mr. Rana. The delegate also levied an administrative penalty against Triple Nine of \$500.00 under the *Regulation* for contravention of section 40 of the *Act*.

34. With respect to the fourth question, namely, whether Mr. Rana was owed any statutory holiday pay, the delegate noted that since Mr. Rana was not a manager he was entitled to statutory holiday pay. The delegate then went on to point out that section 44 of the *Act* requires an employer to compensate an employee with statutory holiday pay, provided the employee has been employed by the employer for at least thirty (30) calendar days before the statutory holiday, and has worked or earned wages for fifteen (15) of the thirty (30) calendar days preceding the statutory holiday. The delegate also noted that section 45 of the *Act* provides that an employee who works on a statutory holiday must be paid for that day at one and one-half times the employee's regular wage for the time worked, up to twelve (12) hours, and double the employee's regular wage for the time worked over twelve (12) hours, and an average day's pay (premium pay). The delegate also noted that an average day's pay is calculated by dividing the amount paid in regular wages for the thirty (30) day period preceding the holiday by the number of days worked.
35. Having said this, the delegate reasoned that Mr. Rana had not been employed for thirty (30) days as at May 19, 2014, and, therefore, was not entitled to be paid for Victoria Day. However, Mr. Rana was owed statutory holiday pay for Canada Day, BC Day, Labour Day and Thanksgiving Day, and statutory premium pay for working on the same days. The delegate calculated the total owing to Mr. Rana is \$678.46 and so ordered Triple Nine to pay Mr. Rana. The delegate also levied an administrative penalty of \$500.00 under the *Regulation* against Triple Nine for the latter's contravention of section 45 of the *Act*.
36. With respect to the fifth question, whether Mr. Rana was owed compensation for length of service, the delegate explained that section 63 of the *Act* requires that an employer must pay compensation for length of service to an employee who has worked over three (3) months unless the employee quits, retires or is dismissed for just cause. In this case, Mr. Rana's first day of work for Triple Nine was May 4, 2014. As at August 3, 2014, Mr. Rana had completed three (3) months with Triple Nine. While Triple Nine denied firing Mr. Rana and argued that he quit because he did not return to work after being directed to leave the workplace on October 14, 2014, the onus was on Triple Nine to show that Mr. Rana quit. The delegate noted that the right to quit is personal to the employee and there must be clear and unequivocal facts to support that the employee voluntarily exercised this right. There is both a subjective and an objective element that needs to be considered in deciding whether an employee quit. Subjectively, the employee has to form an intention to quit and, objectively, he must carry out an act inconsistent with his further employment. The delegate noted that Triple Nine failed to make any argument with regards to Mr. Rana's intention to quit on October 14, 2014, and did not provide any evidence to suggest Mr. Rana's intention to quit existed. Therefore, the delegate determined that Mr. Rana did not have an intention to quit, and Triple Nine's liability to pay compensation for length of service under section 63 of the *Act* is not discharged.
37. The delegate also noted that Triple Nine, in the alternative, argued that Mr. Rana was terminated for just cause for failing to deal with the unserviceable walk-in cooler at the gas station and his ensuing argument with Ms. Sran (which caused Mr. Toor to ask him to leave the workplace). However, the delegate found this argument unpersuasive because of Mr. Toor's evidence at the Hearing that he expected Mr. Rana to return to work after a few days, as he did on a previous occasion. The delegate found this evidence to be inconsistent with Triple Nine's position that Mr. Rana was terminated for just cause and rejected it. As a result, the

delegate went on to determine that Mr. Rana was owed one (1) week's average wages as compensation for length of service under section 63 of the *Act* and levied an administrative penalty of \$500.00 against Triple Nine for contravening section 63.

38. With respect to the sixth question, whether Mr. Rana was owed vacation pay, the delegate noted that section 58 of the *Act* establishes the minimum standards governing vacation pay. In this case, based on the wage statements Mr. Rana received from Triple Nine, there was no evidence to indicate that Triple Nine paid him vacation pay at any time during his period of employment. The delegate, therefore, determined that Mr. Rana was owed vacation pay of 4% of all wages he earned and ordered Triple Nine to pay him \$803.66 for vacation pay.
39. The delegate also levied additional administrative penalties under the *Regulation* against Triple Nine for contraventions of sections 17 (paydays), 18 (payment of wages on termination), 27 (wage statements) and 33 (split shifts) of the *Act*.

## SUBMISSIONS OF TRIPLE NINE

40. Triple Nine's submissions fall into two categories, namely, submissions pertaining to its request for a time extension to the appeal period, and submissions on the merits of the appeal. I will summarize both under separate headings below.

### *(i) Time Extension Request*

41. As indicated previously, on October 21, 2015, the day before the expiry of the appeal deadline, Triple Nine filed its Appeal Form with a single page submission asking for an extension of four (4) weeks to the appeal period in order to obtain a transcript of the Hearing "to take to the employment standards experts for consultations and their opinions" [*sic*].
42. In the same submissions, Mr. Toor states that due to his "health situation" (which he partly attributes to the stress he is suffering as a result of the Complaint), he "had to call an ambulance and go to the hospital" the day after he sent the delegate a response to the Complaint (which the Employment Standards Branch (the "Branch") received on March 3, 2015). He states that he suffered "a major stroke" and was hospitalized for about two (2) weeks. He states that while he participated in the Hearing on March 24, 2015, he was "still under medication" and "not in a position to handle, understand and comprehend the constant changes of evidence and contradictory evidence provided by the complainant under oath." He adds that he "made sure the arbitrator was aware" of his health, although there is no mention of Mr. Toor's "major stroke" or ill health in the Reasons, nor in the Record.
43. Mr. Toor also submits that he is "not in a perfect state of health as of now" and he "may not be able to handle this stress". He states he will require four (4) weeks' extension to the appeal period to obtain the Hearing transcript and "any related notes" from the Branch.
44. Subsequently, on November 6, 2015, Mr. Toor submitted a note with his submissions on the merits of Triple Nine's appeal, advising that he had contacted the Branch and was advised that there was neither a transcript of the Hearing, nor any notes, available to him. With respect to his request for the notes (presumably the delegate's notes at the hearing), he states he was advised that he could submit his request under the *Freedom of Information and Protection of Privacy Act*. It appears that neither Mr. Toor, nor Triple Nine, pursued an application under the said legislation.

*(ii) Merits*

45. In his submissions, dated November 6, 2015, on the merits of the appeal, Mr. Toor largely reiterates his written submissions to the Director before the Hearing and contained in the Record. He states that he has managed Triple Nine, a family business that operates a gas station, coin laundry, convenience store, carwash, internet café and Western Union service for the last few years. In 2014, he states, he turned 70 and was looking for someone to take over the management of the business, and decided to hire Mr. Rana based on the recommendation of his store manager, Ms. Sran.
46. He states Mr. Rana was hired “as a general manager” at a salary of \$2,000.00 per month. Although Mr. Rana did not have knowledge or experience in operating the type of business Triple Nine was engaged in, Mr. Toor states he was willing to train him, including in “hiring and firing of employees”. Until Mr. Rana became fully “capable of hiring and firing employees”, he states he was going to retain those responsibilities.
47. Mr. Toor argues that Mr. Rana was “doing most of the managerial duties”, and as proof he refers to a document entitled “Routine Work Order Book” (the “Book”) which, he argues, contains notes and instructions from Mr. Rana to the staff exhibiting the sort of managerial work Mr. Rana performed. The Book, which Mr. Toor first provided to the Director prior to the Hearing, forms part of the Record.
48. Mr. Toor then goes on to explain that when both Mr. Rana and his wife, Mrs. Rana, came to Triple Nine’s gas station on May 4, 2014 (after Mr. Rana was hired), the suite above the gas station where they were to stay was not ready. Therefore, Ms. Sran took them to her home, where both Mr. and Mrs. Rana stayed during the balance of the month of May and part of June 2014.
49. As Mr. Rana did not have a car, he caught a ride to the gas station with Ms. Sran who worked five (5) days per week, eight (8) hours per day. Mr. Toor suggests, therefore, that Mr. Rana could not have worked more than the hours Ms. Sran was working while he was staying with her.
50. Mr. Toor also indicates that both Mr. and Mrs. Rana moved to the suite above the gas station when it was ready for them, sometime in mid-June, 2014, around the time Mr. Rana was provided a gift of a bed for Father’s Day.
51. Mr. Toor challenges Mr. Rana’s record of hours worked upon which the delegate relied at the Hearing. Mr. Toor contends that the time records of Mr. Rana “were kept and written by Mrs. Rana in her handwriting”. He suggests that they are not reliable, particularly for the month of May, as she was not living in the suite above the gas station, but three (3) miles away at Ms. Sran’s place and, therefore, she could not have been a witness to the hours Mr. Rana worked. Mr. Toor states, at the start of the Hearing, he was not aware that the time records upon which Mr. Rana was relying “were not written by Mr. Rana”. He now argues that that Mrs. Rana should be put “under oath” to answer “some questions”.
52. Mr. Toor then goes on to reconstruct what he thinks Mr. Rana’s hours of work were relative to what was set out in the written time records of Mr. Rana, particularly for the month of May, 2014. He also submits that with respect to all of the other hours Mr. Rana claims to have worked, from June to October, 2014, there needs to be “lot more corrections and questions answered”.
53. Finally, Mr. Toor reiterates that Mr. Rana agreed to be paid \$2,000.00 per month to work as general manager, but later, unilaterally, decided that his wages were \$3,000.00 per month and “[c]hanged his job description” from a manager to “shift work” employee.



## ANALYSIS

54. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act* which states:

### Appeal of director's determination

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

55. An appeal under the *Act* is intended to be an error correction process, with the burden being on the appellant to persuade the Tribunal there is an error in the determination under one (1) of the statutory grounds delineated in section 112 of the *Act*. The *Act* does not provide for an appeal based on errors of fact, and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). The test for establishing an error of law on this basis is strict, and requires the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence, or they are without any rational foundation.
56. Mr. Toor has grounded Triple Nine's appeal in an allegation that the Director failed to observe the principles of natural justice in making the Determination. The Tribunal has explained in previous decisions that principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker (see *Re: Imperial Limousine Service Ltd.*, BC EST # D014/05). The burden is on Triple Nine to provide, demonstrate or establish a cogent evidentiary basis for its appeal under the natural justice ground of appeal (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99). In this case, Triple Nine has not presented any evidence to make out a case of a breach of natural justice.
57. Having said this, I note that in *J.C. Creations Ltd.* (BC EST # RD317/03), the Tribunal, relying on the authority of the Supreme Court of Canada's decisions in *Heralkin v. University of Regina*<sup>1</sup> and *Cardinal v. Kent Institution*<sup>2</sup>, recognized that a failure to observe principles of natural justice is a species of error of law. The Tribunal also warned that it is inappropriate to take an "overly legalistic and technical approach" to the appeal document, and instructed that "[i]t is important that the substance, not the form, of the appeal be treated fairly by all concerned". Therefore, although Triple Nine has not ticked off the "error of law" box on the Appeal Form, I will consider Triple Nine's submissions in context of the "error of law" ground of appeal as well.

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<sup>1</sup> [1979] 2 S.C.R. 561

<sup>2</sup> [1985] 2 S.C.R. 643

58. The Tribunal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*<sup>3</sup>, adopted the following definition of “error of law”:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
59. In this case, Mr. Toor’s submissions on the merits of the appeal primarily challenge two (2) conclusions of the delegate; namely: (i) Mr. Rana was not a manager and, therefore, entitled to overtime wages under section 40 of the *Act*; and (ii) the amount of overtime hours Mr. Rana worked for which Triple Nine failed to pay him. Based on my review of the Record, as well as the Reasons, Mr. Toor had an opportunity to, and did, weigh in on both these questions – whether Mr. Rana was a manager and, if not, what were his hours of work – in his written submissions before the Hearing and/or in his evidence at the Hearing.
60. In concluding that Mr. Rana was not a manager, the delegate considered all of the evidence presented by the parties which is summarized at page R3 to R7 of the Reasons. The delegate noted that Mr. Rana performed some of the functions of a manager, including supervision and direction of subordinate employees, but the majority of his time was spent doing routine tasks and duties similar in nature to any other employee. The delegate also noted that Mr. Rana was either left to supervise only one (1) or two (2) other employees, or was the only employee on shift when he worked. The delegate also reasoned that it was unlikely for Triple Nine to require two managers, Mr. Rana and Mrs. Sran, on those days when the two of them worked the same shifts, to supervise the small number of staff, given the scope of Triple Nine’s business operations. In the circumstances, I do not find the delegate to have erred in law within the meaning of “error of law” as defined in *Gemex, supra*, in concluding that Mr. Rana was not a manager. More particularly, this is not a case of the delegate acting without any evidence or on a view of evidence that could not reasonably be entertained, or misapplying the *Act* or committing a palpable overriding error, or arriving at a clearly wrong conclusion of fact. To the contrary, I find the delegate’s reasons for concluding Mr. Rana was not a manager are well founded in evidence and persuasive.
61. With respect to the question of the hours Mr. Rana worked, Triple Nine was required to keep records of hours Mr. Rana worked, regardless of how the latter was paid. As indicated by the delegate in the Reasons, Triple Nine did not produce any payroll records or records of hours worked (although these records were demanded) because Triple Nine claimed that they had been stolen from the place of business. In the circumstances, it was open to the delegate to rely upon Mr. Rana’s records as the best evidence. While it is apparent that Mr. Toor and Triple Nine disagree with the ultimate conclusion of the delegate on this question, Triple Nine has not established that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable, or that the Director misapplied the law in the *Act*. Therefore, Triple Nine has again not made out a sufficient case to establish error of law.
62. Having said this, I note that Mr. Toor now challenges the reliability of the records of hours Mr. Rana presented, alleging that these records were prepared by Mrs. Rana who was not present to witness what hours Mr. Rana worked. The time to challenge these records was at the Hearing of the Complaint and not in the appeal. I do not find this argument meritorious in the least.

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<sup>3</sup> [1998] B.C.J. No. 2275 (B.C.C.A.)

63. Lastly, I also find that there is nothing in the submissions of Mr. Toor that would qualify as “new evidence” within the meaning of section 112(1)(c) of the *Act* and the test set out for “new evidence” in the Tribunal’s decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03).
64. In the result, I find the appeal has no prospect of succeeding, and I dismiss it.
65. In light of my decision above, I find Triple Nine’s request for an extension of the appeal period is moot.

### **ORDER**

66. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated September 14, 2015, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**