Employment Standards TRIBUNAL

An appeal

- by -

Khela Excavating Ltd.
("KEL")

- 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/147

DATE OF DECISION: December 29, 2015

DECISION

SUBMISSIONS

Gurpreet Badh — counsel for Khela Excavating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Khela Excavating Ltd. ("KEL") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 8, 2015 (the "Determination").

2. The Determination concluded that KEL contravened Part 3, section 18 (payment of wages upon termination); Part 4, section 40 (overtime); Part 5, section 45 (statutory holiday pay); and Part 7, section 58 (annual vacation pay) of the *Act* in respect of the employment of Gurdev Singh Judge ("Mr. Judge"), and ordered KEL to pay Mr. Judge wages in the amount of $5,678.01, including accrued interest under section 88 of the *Act*.

3. The Determination also levied administrative penalties of $2,500.00 under section 29 of the *Employment Standards Regulation* (the "*Regulation*") for contraventions of sections 17, 18, 45 and 58 of the *Act* and section 37.3 of the *Regulation*.

4. The total amount of the Determination is $8,178.01.

5. KEL has appealed the Determination, alleging that the Director failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. KEL seeks the Employment Standards Tribunal (the "Tribunal") to cancel the Determination.

6. In correspondence dated November 13, 2015, the Tribunal sent KEL's appeal to Mr. Judge and to 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 the Director to provide the section 112(5) "record" (the "Record") that was before the Director at the time the Determination was made.

7. On November 27, 2015, the Tribunal received the Record from the Director, and forwarded a copy of the same to KEL on November 30, 2015. The Tribunal afforded KEL the opportunity to object to the Record's completeness by December 14, 2015, but KEL did not raise any objection to the Record's completeness. Accordingly, the Tribunal accepts the Record as complete.

8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. Accordingly, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal, the written submissions of counsel on behalf of KEL, 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. Judge will, and the Director may, be invited to file further submissions. KEL 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

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

THE FACTS

10. The facts set out below are based on the summary of the facts found in the Reasons.

11. KEL operates a short-haul trucking and excavation business.

12. Pursuant to a BC Online: Registrar of Companies – Corporation Search, conducted by the delegate on June 18, 2015, KEL was incorporated on March 21, 2006, with Tarlochan (Terry) S. Khela ("Mr. Khela") and Sulinderpal S. Khela listed as its directors.

13. KEL employed Mr. Judge as a short-haul truck driver from June 21, 2014, to January 21, 2015, at the rate of pay of $22.00 per hour.

14. As at the end of December 2014, Mr. Judge was paid wages once per month by KEL. He received a total of $24,931.50 in gross wages during his period of employment with KEL. He did not receive any statutory holiday pay, overtime pay or vacation pay, as KEL considered these to be included in Mr. Judge's hourly wage rate. Mr. Judge also did not receive any wages for work he performed in January 2015.

15. On July 9, 2015, Mr. Judge filed a complaint against KEL under section 74 of the *Act*, alleging that the latter contravened the *Act* by failing to pay him regular wages, overtime, statutory holiday pay and vacation pay (the "Complaint").

16. On August 6, 2015, the delegate issued a Demand for Employer Records to KEL requesting the latter to produce all employment records for Mr. Judge for the period June 22, 2014, to January 21, 2015 (the "Demand"), including specifically the following:

- any and all payroll records relating to wages, hours of work and conditions of employment, as specified in section 28 of the *Employment Standards Act*
- any and all documents relating to the termination of the above-named employee(s), including any and all documents that the employer relies on to establish just cause to terminate the employee, as well as a copy of the Record of Employment.
- any receipts paid by the employee for deliveries, fuel and other business expenses
- hours worked on each day *(not a summary)* (italics mine)

17. Mr. Khela responded to the Demand by supplying the delegate with a single page, dated August 22, 2015, containing a typewritten summary of the hours Mr. Judge worked for KEL from January 2 to January 21, 2015, totaling 91 hours (the "Typewritten Summary"). Mr. Khela also attached to the Typewritten Summary some paystubs associated with Mr. Judge's employment for the period June 30, 2014, to January 31, 2015. He later followed-up by sending the delegate seven (7) more pages, each dated August 31, 2015, and on the

letterhead of KEL, summarizing Mr. Judge's hours worked during the period June 21, 2014, to December 31, 2014.

18. Mr. Judge, on his part, before the Hearing, submitted to the delegate his handwritten notes of hours he worked in August and September, 2014, and January 2015(the "Pre-Hearing Notes"), which the delegate subsequently forwarded to Mr. Khela on August 26, 2015.

19. On September 15, 2015, the delegate held a hearing into the Complaint (the "Hearing"). Both Mr. Khela and Mr. Judge attended at the Hearing. Each brought with them a friend who acted as a translator for each of them.

20. At the Hearing, the delegate considered the following two (2) questions:

(i) What wages are owed to Mr. Judge for work performed in January 2015?

(ii) Is Mr. Judge entitled to overtime, statutory holiday and vacation pay?

21. Both parties provided their evidence on each of these questions, which the delegate summarizes on pages 8 to 11 inclusive of the Reasons.

22. With respect to the first question of what wages are owed to Mr. Judge for work performed in January 2015, the delegate noted that Mr. Judge claimed 121.5 hours worked for January 2015 against KEL's submission that he worked 91 hours.

23. The delegate also noted that Mr. Judge submitted into evidence, at the Hearing, his Day-Timer which contained handwritten notes of hours he worked. The delegate noted that Mr. Judge testified that that he would write down his start time, end time, and where he drove in the Day-Timer each day. Therefore, the Day-Timer contained Mr. Judge's contemporaneous notes.

24. The delegate also noted that Mr. Judge explained that the Pre-Hearing Notes were based on his Day-Timer entries because he was concerned that his Day-Timer entries may be illegible.

25. KEL did not object to the additional evidence of Mr. Judge's Day-Timer at the Hearing, and KEL was provided with a copy of the same at the Hearing.

26. In preferring the evidence of Mr. Judge over KEL's Typewritten Summary, the delegate reasoned as follows:

> The Employer did not submit contemporaneously kept records of the hours worked by Mr. Judge on a daily basis. Rather, the Employer submitted monthly summaries of his hours prepared after the end of the employment relationship (dated August 22 and August 31, 2015). In addition, Khela Excavating Ltd. did not provide evidence to substantiate the hours it said Mr. Judge worked, such as customer invoices, office operating notes, or chart sheets signed by customers. The Employer did not submit any records of breaks taken by Mr. Judge. As there was no evidence of Mr. Judge actually taking breaks, I cannot find that he took breaks.
>
> In the absence of any substantive evidence from the Employer to show Mr. Judge's actual daily hours of work, I must rely on the best evidence available which is Mr. Judge's entries into his day timer which include more detail such as start and end times and loads driven. I have relied on Mr. Judge's day timer to determine his hours of work. I find that the daily notes taken by Mr. Judge in his day timer are the best evidence of his hours worked because these notes were kept contemporaneously with the work.

> I also observe that for the most part the hours recorded by Mr. Judge mirror those supplied by the Employer with only slight differences. The analysis of difference[s] was done to assist in assessing credibility and to determine overtime wages payable. For the months of August through December, when the employment relationship was ongoing, and for which wages were paid, there is only a material difference of 10.75 hours more in Mr. Judge's day timer entries.

27. The delegate then went on to conclude, with respect to the hours Mr. Judge worked in January 2015, as follows:

> With respect to the hours Mr. Judge worked in January 2015, I have relied on Mr. Judge's testimony at the adjudication wherein he described having worked 121.5 hours in total. It is observed that Mr. Judge based his testimony on his review of both his day timer entries and his re-written notes of hours worked that month. I prefer the evidence of Mr. Judge for the reasons set out above. I find Mr. Judge is owed wages for work performed in January as set out in the attached calculation sheet.

28. The calculation sheet attached to the Determination shows that the delegate found Mr. Judge worked 112.50 regular hours at $22.00 per hour, for a total of $2,475.00 in regular wages. He also found that Mr. Judge worked 76.25 hours of overtime which he dealt with separately when calculating overtime hours payable during the six-month capture period from July 22, 2014, to January 21, 2015 (the "Capture Period").

29. With respect to the second question, namely, what overtime, statutory holiday and vacation pay Mr. Judge was entitled to, the delegate noted that Mr. Judge claimed 51.3 hours of overtime worked in August and September, 2014, statutory holiday pay and 4% vacation pay on all wages earned during his period of employment with KEL.

30. The delegate also noted that Mr. Khela did not take issue with the hours Mr. Judge recorded in his Day-Timer for the months prior to January 2015. However, Mr. Khela submitted that there was an agreement between the parties to include overtime, vacation and statutory holiday pay within the hourly wage rate of $22.00 that KEL paid to Mr. Judge. The delegate, however, rejected KEL's latter submission, stating that section 4 of the *Act* prevents an employer from waiving the minimum requirements of the *Act*. More particularly, the delegate reasoned that the *Act* does not permit "the embedding of overtime, vacation or statutory holiday pay into all-encompassing wage rate" and any agreement to do such contravenes the *Act* and is unenforceable. In the result, the delegate concluded that Mr. Judge was entitled to overtime, vacation and statutory holiday pay, as required by the *Act* and the *Regulation*, and went on to determine Mr. Judge's entitlement for each.

31. With respect to overtime, the delegate noted that, pursuant to section 37.3 of the *Regulation*, an employer must pay a short haul truck driver at least 1.5 times his regular wage for all hours worked in excess of nine (9) hours in a day and 45 hours in a week. Based on Mr. Judge's Day-Timer, he frequently worked overtime, but KEL only paid him straight time for all hours worked. The delegate then went on to calculate the overtime worked by Mr. Judge during the Capture Period of the Complaint, and concluded that the latter worked 76.25 hours of overtime, and should have been compensated an extra $11 per hour for the said hours, for a total of $838.75, and so ordered KEL to pay him.

32. With respect to statutory holiday pay, the delegate reviewed sections 44, 45 and 46 of the *Act* which address statutory holidays and statutory holiday pay. Based on Mr. Judge's Day-Timer, the delegate concluded that, during the Capture period, Mr. Judge qualified for the following statutory holidays: BC Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and New Year's Day. Since Mr. Judge did not work on any of these statutory holidays, he was only entitled to an average day's pay for each statutory holiday.

The delegate calculated the amount owed to Mr. Judge for statutory holiday pay to be $1,079.62, and so ordered KEL to pay him.

33. With respect to vacation pay, the delegate noted that Mr. Judge was entitled to receive vacation pay in the amount of 4% for the duration of his employment, over and above his regular wage rate, his overtime and statutory holiday pay. Since KEL did not pay vacation pay to Mr. Judge upon termination of his employment, within the timeframe established by section 18 of the *Act*, KEL owed him vacation pay on the gross wages paid to him during the course of his employment, and on those wages he was owed in the Determination. The delegate calculated the vacation pay owed to Mr. Judge to be in the amount of $1,172.99.

34. Pursuant to the *Regulation,* the delegate also levied five (5) administrative penalties of $500.00 each against KEL for a total of $2,500.00, for the latter's breaches of sections 17, 18, 45 and 58 of the *Act*, and 37.3 of the *Regulation*.

SUBMISSIONS OF KEL

35. Counsel for KEL made written submissions in the appeal, invoking the "natural justice" and "new evidence" grounds of appeal in subsections 112(1)(b) and (c) of the *Act*.

(i) Natural Justice

36. Under the natural justice ground of appeal, counsel appears to argue that the delegate's disparate treatment of Mr. Judge's Pre-Hearing Notes "compiled after the fact from his personal [Day-Timer]" and Mr. Khela's Typewritten Summary was unfair and a breach of natural justice. According to counsel, Mr. Khela's Typewritten Summary should have been "afforded similar evidentiary weight" as Mr. Judge's Pre-Hearing Notes.

37. Counsel further submits that Mr. Khela did not object to Mr. Judge's personal Day-Timer (which the latter adduced into evidence at the Hearing) because Mr. Khela "presumed his own competing evidence, compiled from his handwritten notes, reproduced in typewritten format and submitted prior to adjudication, would be afforded similar evidentiary weight to [Mr. Judge's] compiled notes".

38. Counsel also submits that:

> Prior to the adjudication itself, the Appellant was only aware of the Respondent's [Pre-Hearing Notes], which the Appellant understood to contain the information to be challenged. Lacking legal skills and knowledge, and requiring a translator in order to participate in the adjudication, the Appellant was unaware that the format of the evidence would be critical to the Decision.
>
> [B]y allowing the Respondent's submission into evidence of his hand-written notes, without instructing the Appellant of the potential impact such post-disclosure evidence might have on the balance of probabilities and the consequent Determination, there was a breach of natural justice.

39. Lastly, under the natural justice ground of appeal, counsel submits that Mr. Judge failed to submit (presumably to KEL) any National Safety Code Reports and, therefore, this "calls into question the thoroughness and contemporaneity of [Mr. Judge's] records".

(ii) New Evidence

40. With respect to the new evidence ground of appeal, counsel states that KEL seeks to submit as "new evidence" its contemporaneously prepared handwritten records of Mr. Judge's hours of work in January 2015 ("KEL's Handwritten Notes") which allegedly form the basis of the Typewritten Summary KEL previously adduced. Counsel does not submit similar handwritten notes of KEL for any other period that forms part of the Capture Period.

41. KEL's Handwritten Notes are contained in a single-page document, not too different from the Typewritten Summary, and neatly delineate, in what appears to be the same handwriting and pen, a record of all hours Mr. Judge purportedly worked from January 2, 2015, to January 21, 2015.

42. Counsel submits that KEL's Handwritten Notes "is of identical form to that submitted by [Mr. Judge] at the adjudication, which the Director found credible and ultimately convincing despite its late admission". It would appear that Counsel is referring here to the Day-Timer Mr. Judge adduced at the Hearing to which Mr. Khela did not object.

43. Counsel also submits that because Mr. Khela was made aware of Mr. Judge's "competing information [of hours worked], presented in an easily legible, tidied format prior to adjudication, [Mr. Khela] presented and submitted his information in a similar format".

44. Counsel further submits that because Mr. Khela was unaware that Mr. Judge would be "supplementing his compiled handwritten notes [i.e. the Pre-Hearing Notes] with his day timer until the adjudication took place" and because he was "lacking in legal knowledge" and "required a translator" in order to participate in the adjudication, "[i]t would not have been reasonable to expect [Mr. Khela] to have presented his handwritten records [KEL's Handwritten Notes] at [the] adjudication".

45. Counsel concludes by arguing that KEL's Handwritten Notes "is relevant to the dispute", "reasonably capable of belief" and "if believed, on its own or when considered with other evidence, could have led the Director to a different conclusion on the central issue within the complaint".

ANALYSIS

46. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

47. The Tribunal has indicated time and again that an appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the determination under one (1) of the above statutory grounds.

48. Having said this, it should be noted that the grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact, and the Tribunal does not have any authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than that made by the Director in the determination unless the latter's findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03).

49. KEL has framed its appeal on the "natural justice" and "new evidence" grounds of appeal. The two (2) grounds are related, as seen in the submissions of counsel for KEL. I will discuss each separately below.

(i) Natural Justice

50. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal succinctly summarized the natural justice concerns that typically arise in the context of the complaint process and applicable to this case:

> 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)

51. Under the natural justice ground of appeal, counsel appears to be raising two (2) issues in a somewhat confusing manner. First, he appears to be taking issue with Mr. Judge's late introduction of the Day-Timer into evidence at the Hearing. He states that Mr. Khela did not object to this evidence because "he presumed his own competing evidence, compiled from his handwritten notes, reproduced in typewritten form and submitted prior to adjudication, would be afforded similar evidentiary weight" to Mr. Judge's compiled notes. Counsel states that it was "the content of the evidence, not the format" that Mr. Khela believed to be relevant. He adds that Mr. Khela lacked legal skills and knowledge, and required a translator in order to participate in the adjudication. Therefore, he was unaware that "the format of the evidence would be critical to the Decision".

52. I find the above arguments of counsel unpersuasive for the following reasons.

53. Most Employers who appear before the Employment Standards Branch do not possess "legal skills and knowledge". Mr. Judge was similarly positioned to Mr. Khela in this regard, as he did not appear to have "legal skills and knowledge" either. Like Mr. Khela, Mr. Judge also appeared with a friend/translator at the Hearing. I do not find any evidence giving rise to any of the natural justice concerns described in *Imperial Limousine Service Ltd.*, *supra,* in this case just because Mr. Khela needed an interpreter or he lacked "legal skills and knowledge".

54. With respect to the Day-Timer Mr. Judge presented into evidence at the Hearing, I note Mr. Khela did not object to it. He was provided with a copy of it and, from my review of the Reasons, he was afforded an opportunity to present KEL's case and to make submissions challenging the weight to be given to the veracity of any documentation - whether the Day-Timer or the Pre-Hearing Notes - Mr. Judge relied on at the Hearing.

55. As noted above, Mr. Khela relied on the Typewritten Summary to challenge Mr. Judge's evidence of the hours the latter worked in January 2015. The delegate found the Typewritten Summary not to be evidence of contemporaneous records of hours worked by Mr. Judge. It should be noted that well in advance of the Hearing date, on August 6, 2015, the delegate issued to KEL the Demand which specifically requested, among other things, Mr. Judge's "hours worked on each day (*not a summary*)" (italics mine), but Mr. Khela failed to accede to this request. While counsel argues that Mr. Khela did not possess "legal skills and knowledge", the Demand was, in my view, clear and in terms a lay person would understand. It specifically stated "(not summary)", yet Mr. Khela produced the Typewritten Summary.

56. In *Hofer v. Director of Employment Standards* (BC EST # D538/97), the Tribunal stated:

> In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

57. The Tribunal also stated:

> Thus, in my opinion, the appropriate test to apply in such circumstance is 'the best evidence rule'. That is, the Director's delegate must make a reasoned decision, based on an evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

58. In this case, in the absence of contemporaneously-kept records of hours worked by Mr. Judge from KEL, and in the absence of other evidence of KEL "such as customer invoices, office operating notes, or charge sheets signed by customers", it was open to the delegate, at the Hearing, to rely upon Mr. Judge's Day-Timer as the "best evidence" of hours Mr. Judge worked. The Day-Timer contained contemporaneous recording of Mr. Judge's hours worked during the Capture Period. I find KEL has not discharged the onus to establish that it was unreasonable for the delegate to rely on Mr. Judge's records as required in *Hofer, supra*. In the circumstances, I do not find the delegate committed any breach of the principles of natural justice in preferring the evidence of Mr. Judge over the evidence adduced by KEL or Mr. Khela.

59. Having said this, counsel for KEL also appears to contend that the delegate had some obligation to inform Mr. Khela, presumably at the Hearing, of "the potential impact" of the handwritten notes in the Day-Timer in terms of the ultimate decision of the delegate in the Determination. Counsel argues that the delegate committed a breach of natural justice in failing to so inform Mr. Khela. There seems to be an underlying suggestion in this argument that had Mr. Khela known, in advance, that the delegate was going to prefer the evidence in the Day-Timer over the Typewritten Summary, he may have objected to the Day-Timer or perhaps asked for an adjournment to produce KEL's Handwritten Notes. I find counsel's argument above unpersuasive. The delegate has no obligation to let a party know in advance of the Determination whether some evidence of the opposing party is more persuasive or not so as to allow the first party to decide whether it should object to the evidence on whatever basis or to consider producing other evidence.

60. Having said this, I reiterate that prior to the Hearing, on August 6, 2015, KEL was served with the Demand that clearly asked for production of Mr. Judge's "hours worked on each day (not a summary)". If KEL had in its possession contemporaneously-recorded hours worked by Mr. Judge on each day, then it should have produced such for the entire Capture Period and "not a summary". However, KEL only produced the Typewritten Summary. No one misled KEL into producing the Typewritten Summary in substitution of KEL's Handwritten Notes (if they existed then).

61. In the circumstances, I do not find there is any breach of natural justice committed by the delegate.

(ii) New Evidence

62. In *Bruce Davies and Others, Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal set out the following four (4) conjunctive requirements that must be met before new evidence will be considered:

> (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;
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> (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 the other evidence, have led the Director to a different conclusion on the material issue.

63. As indicated, counsel has now attached KEL's Handwritten Notes which purportedly summarize, in a single page, Mr. Judge's hours worked in January 2015. The 15 lines in the single document appear to be written in the same pen with the same handwriting. Counsel contends that this document presents contemporaneous recording by KEL of hours worked Mr. Judge in January 2015. He contends that the document is "identical [in] form" to that submitted by Mr. Judge at the Hearing and, therefore, it should be found credible and convincing, although submitted late. Counsel further states that this document is relevant to the dispute, reasonably capable of belief, and if believed, on its own or when considered with other evidence, could have led the Director to a different conclusion on the central issue within the complaint.

64. At the outset, I do not understand why Mr. Khela found it necessary to present the Typewritten Summary of KEL's Handwritten Notes when the latter document provides a neatly written and very legible summary of hours worked by Mr. Judge in January 2015. I also find it curious that there is no similar handwritten summary of hours worked by Mr. Judge for all other months during the Capture Period. Having said this, it is clear from counsel's submissions that the document in question - KEL's Handwritten Notes - did exist prior to the Hearing but is only now being produced by KEL in the appeal. The failure of KEL to produce this document before, or at, the Hearing and before the Determination was made, contravenes the first of the four (4) requirements for adducing "new evidence" on appeal set out in *Merilus Technologies Inc., supra*. As indicated earlier, the four (4) requirements in *Merilus Technologies* for accepting "new evidence" on appeal are conjunctive and, therefore, the failure to satisfy the first requirement in this case sufficiently disqualifies KEL's Handwritten Notes from being considered as new evidence in the appeal.

65. Having said this, KEL's counsel argues that KEL's late introduction of KEL's Handwritten Notes is similar to Mr. Judge's late introduction of his Day-Timer at the Hearing. I find the parallel that counsel is trying to draw here unpersuasive, and reject this argument as without merit. Mr. Judge produced the Day-Timer at the Hearing, and KEL and Mr. Khela were afforded an opportunity to object to it, or perhaps obtain an adjournment to study the Day-Timer further but did not see any need to object or seek an adjournment. Further, at the Hearing, KEL and Mr. Khela had an opportunity to test the veracity of Mr. Judge's Day-Timer and challenge it. Mr. Judge does not have the same luxury in terms of KEL's Handwritten Notes produced for the first time in the appeal.

66. Finally, even if the Tribunal were to accept that KEL's Handwritten Notes as "new evidence" in this appeal, I do not find the handwritten document to be of such probative value that when considered on its own, or with other evidence, it would have led the delegate to a different conclusion on the issue of Mr. Judge's hours worked. The evidence contained in Mr. Judge's Day-Timer, in my view, is very compelling and it was open

for the delegate to rely upon that evidence to determine the hours Mr. Judge worked in January 2015 and during the balance of the Capture Period.

67. In the result, I do not find that KEL's appeal has any reasonable prospect of succeeding, and I dismiss it.

ORDER

68. 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 October 8, 2015, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal