Employment Standards TRIBUNAL

Citation: Fraser Valley Management Consultants Canada Ltd. (Re)
2019 BCEST 57

An appeal

- by -

Fraser Valley Management Consultants Canada Ltd. ("FVMCC")
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Shafik Bhalloo

FILE NO.: 2019/15

DATE OF DECISION: June 13, 2019

DECISION

SUBMISSIONS

Sunanda Kikla	on behalf of Fraser Valley Management Consultants Canada Ltd.

OVERVIEW

1. On February 19, 2019, pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Windsor Hotel Ltd. ("Windsor Hotel") carrying on business as Pacific Grill Restaurant filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on January 11, 2019 (the "Determination"). On November 19, 2018, before the Determination was made, Windsor Hotel amalgamated with several other companies or businesses operated by or associated with Mr. Nitai Chand Goswami ("Mr. Goswami") and Ms. Kikla, namely, Fraser Valley Educational Consultants Inc., Fraser Valley Management Consultants Canada Ltd., Greenwood Motel Ltd., and Pacific Hotel Ltd. As a result of the amalgamation, Windsor Hotel and other entities involved in the amalgamation ceased to exist. Instead, a new legal entity was formed. The new entity retained the name of one of the amalgamating companies and it is called Fraser Valley Management Consultants Canada Ltd. ("FVMCC"). Therefore, effectively, the appellant and "the Employer" in this case is FVMCC.

2. The Determination found that the Employer contravened Part 3, sections 17 (payday) and 18 (payment of wages on employment termination); Part 4, 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 *ESA* in respect of the employment of Rajesh Selvaraj ("Mr. Selvaraj") and Sakthivel Vethanayagam ("Mr. Vethanayagam") (collectively the "Complainants"). The Determination ordered the Employer to pay the Complainants wages in the total amount of $44,946.84 inclusive of accrued interest. The Determination also levied seven (7) administrative penalties against the Employer totaling $3,500 for breaches of sections 17, 18, 28, 40, 46, 58, and 63 of the *ESA*. The total amount of the Determination is $48,446.84.

3. The Employer appeals the Determination on all three grounds of appeal under section 112(1) of the *ESA*, namely, that the Director erred in law and breached 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. The Employer is seeking the Tribunal to cancel the Determination or to refer it back to the Director.

4. The deadline to file the appeal of the Determination was 4:30 p.m. on February 19, 2019. On February 19, 2019, the Employer, through its representative, Sunanda Kikla, ("Ms. Kikla"), sent seven (7) emails between 3:35 p.m. and 5:16 p.m. The emails include the Employer's Appeal Form, the Determination, the Reasons for the Determination (the "Reasons"), and written appeal submissions.

5. On initial review of the appeal submissions, it appears that the Employer is requesting the Tribunal to extend the appeal period to provide additional documents in support of its appeal. However, the Tribunal, later obtained clarification from Ms. Kikla who indicated that the Employer was merely seeking permission

to submit documents referenced in paragraphs 1 to 18 of the appeal submissions by email as the total number exceeded 50 pages. The Tribunal acceded to the Employer's request and permitted the Employer to email the documents. The total of the documents and submissions of the Employer exceed 850 pages and include a separate appeal of a determination issued against Mr. Goswami in his personal capacity (the "Director's Appeal"). The documents also include materials pertaining to complaint determinations by the Director against several corporations Mr. Goswami and Ms. Kikla have been involved in including some of those that amalgamated to form FVMCC.

6. This decision will *not* deal with the Director's Appeal or any other determinations. It is strictly limited to the appeal of the Determination.

7. On March 15, 2019, the Tribunal corresponded with the parties advising them that it had received the Employer's appeal of the Determination. In the same correspondence, the Tribunal informed the Director to provide the section 112(5) "record" (the "Record") and notified the other parties that no submissions were being sought from them with respect to the merits of the appeal at this stage.

8. On March 26, 2019, the Director provided the Record to the Tribunal. A copy of the same was sent by the Tribunal to the Employer and the Complainants on April 8, 2019. The parties were provided an opportunity to object to its completeness by April 24, 2019. No party objected to the completeness of the Record.

9. On May 8, 2019, the Tribunal informed the parties that the appeal had been assigned to a Panel, it would be reviewed, and following the review, all or part of the appeal may be dismissed under section 114(1) of the *ESA*. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from the Complainants and the Director on the merits of the appeal. The Employer will then be given an opportunity to make a final reply to those submissions, if any.

10. This decision is based on the Employer's written submissions and documents, the Record, the Determination, and the Reasons.

ISSUE

11. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

BACKGROUND AND REASONS FOR THE DETERMINATION

12. Windsor Hotel incorporated under the laws of British Columbia on May 24, 2016. Mr. Goswami, Pushkar Kikla ("Pushkar") and Sameer Kikla ("Sameer") were its directors. Mr. Goswami was also its sole officer.

13. As indicated above, Windsor Hotel, together with several other companies operated by Mr. Goswami, amalgamated on November 19, 2018, creating a new entity, FVMCC. The Notice of Articles of FVMCC shows Mr. Goswami is its sole Director.

14. Ms. Kikla, who is Mr. Goswami's wife and mother to Pushkar and Sameer, was a director of Fraser Valley Management Consultants Canada Ltd. and Fraser Valley Educational Consultants Inc. ("FVEC") at various

times, before they amalgamated into FVMCC. Ms. Kikla was also an officer, at some point, of Global Training Consultants Ltd. ("GTC"). Mr. Goswami was also a director in FVEC and GTC at various times. Over the course of the last two years or so, several determinations have been issued by the Employment Standards Branch ("the Branch") for wages owed by some of the above-mentioned companies because of complaints filed by employees.

15. The Employer operated a restaurant in Greenwood, BC, under the name Pacific Grill Restaurant ("Pacific Grill"). Mr. Selvaraj and Mr. Vethanayagam were both employed as cooks by the Employer at Pacific Grill from March or April 2018, until August 6 or 7, 2018, when their employment ended.

16. On August 4, 2018, pursuant to section 74 of the *ESA*, the Complainants filed their complaints against the Employer, alleging that the Employer contravened the *ESA* by failing to pay them regular wages, overtime wages, statutory holiday pay, and vacation pay ("the Complaints").

17. The delegate of the Director investigated the Complaints by communicating with and receiving submissions from the Complainants and the Employer. In the Reasons, the delegate summarizes the parties' relevant evidence.

Complainants' evidence

18. The delegate notes the evidence of the Complainants as follows:

- Mr. Selvaraj and Mr. Vethanayagam are temporary foreign workers from India who, with the assistance of an immigration agency, Delta Immigration & Employment Consultants Ltd., secured employment with the Employer.
- Both Complainants were interviewed by Mr. Goswami who offered them employment as cooks at Pacific Grill.
- The Complaints accepted the offer of employment by signing employment agreements, dated December 15, 2017. The agreements provided that each Complainant would be paid an annual salary based on a 40-hour work week, expressed in an hourly rate. In the case of Mr. Vethanayagam, he was promised a wage rate of $15 per hour while Mr. Selvaraj's was promised $17 per hour. Both were promised 4% vacation pay. They were each to be paid on a semi-monthly basis.
- Mr. Vethanayagam commenced his employment with the Employer on March 15, 2018, and Mr. Selvaraj followed shortly after on April 28, 2018.
- The Complainants were responsible for cooking breakfast, lunch, and dinner at the Pacific Grill.
- While neither the Employer nor the Complainants kept a written record of hours worked, the Complainants recollect working seven days a week, 12 hours per day (from 8:00 a.m. to 8:00 p.m.), for a total of 84 hours a week at the start of their employment.
- From June 2018 onward, the Complainants continued to work seven days a week for a total of 57 hours. This schedule consisted of 8 hours per day from Wednesday to Sunday

(sometime between 6:00 a.m. to 3:00 p.m. or 1:30 p.m. to 11:00 p.m.) and a 12-hour day and 5-hour day on Monday and Tuesday respectively.

- Mr. Selvaraj admitted that he missed one day of work in June because he was assisting his wife, who resided in India, with her medical concerns. He also admitted that on two occasions in June, Pacific Grill opened late at 6:30 a.m.
- Mr. Selvaraj also agrees he missed two days of work on July 31 and August 1, 2018, when he travelled to Vancouver for a US Visa interview. He also missed two hours of work on August 2, 2018, as he commenced work at 8:00 a.m.
- On August 6, 2018, the Complainants' last day at work, Mr. Selvaraj worked an 8-hour day and Mr. Vethanayagam worked 6 hours because he attended to a personal matter for 2 hours.
- Both Complainants claimed the Employer did not pay them wages in accordance with their employment agreements.
- In the case of Mr. Selvaraj, he worked just over three months and received four payments totaling $2,000:

    1. May 2018 - $500.00 money order to his wife in India
    2. July 11, 2018 - $750.00 online banking payment
    3. July 16, 2018 - $500.00 online banking payment
    4. July 18, 2018 - $250.00 cash payment

- In the case of Mr. Vethanayagam, he worked almost five months and received four payments totaling $3,066.10:

    5. May 2018 - $1,350.00 cash payment
    6. July 11, 2018 - $750.00 cash payment
    7. July 11, 2018 - $750.00 online banking payment
    8. July 18, 2018 - $216.10 cash payment

- While Mr. Vethanayagam signed pay statements at the request of the Employer and did not dispute $50 deductions as shown on each pay statement, he contends that the Employer never paid him the amount of wages owed after the end of each of those pay periods.
- On the morning of August 6, 2018, Mr. Selvaraj says he expressed his displeasure to Mr. Goswami with respect to the Employer's failure to pay wages in a timely manner. He informed Mr. Goswami that he and Mr. Vethanayagam would stop working if they did not receive outstanding wages.
- Mr. Goswami insisted they continue to work and, if not, they should leave his restaurant. The conversation progressed to the level where Mr. Goswami became frustrated and told the Complainants: "bastards, get the hell off here. Leave the accommodation to go where you want to go". As a result, the Complainants left the premises and did not return to work.

- Subsequently, each Complainant received a "Summary Account" from Fraser Valley Management Consultants, which they say was affiliated with the Employer (i.e. Windsor Hotel).
- The Complainants state they were requested to sign the bottom of their individual Summary Accounts, but each refused because the Summary Accounts were inaccurate and contained false representations of wages earned and paid to them.

19. On August 30, 2018, the delegate sent a letter to the Employer delineating the Complainants' allegations (the "Letter") together with the complaint resolution process. This correspondence also included a copy of the Complaints, supporting documents, and Demand for Employer Records (the "Demand").

20. In the Letter, the delegate stated that if the Employer wished to dispute the Complainants' allegations then it should provide its reasons in writing and attach a copy of the payroll records and any other supporting documentation by September 13, 2018.

21. The Demand required the Employer to produce employment records relating to wages, hours of work, and conditions of employment and all documents relating to the termination of the Complainants' employment by September 13, 2018. However, the Employer failed to comply.

22. Instead, the Employer provided the delegate with multiple responses to the Complaints. On September 13, 2018, Mr. Goswami copied the delegate a 158-page submission to Olivet Carullo, immigrant services settlement worker for Kelowna Community Resources, with the reference heading "48 Hour Notice to Withdraw False Claims against my Businesses and Withdraw False Recommendation Made to CIC RE: TFWP - Rajesh Selvaraj and Sakthivel Vethanayagam".

23. On September 14, 2018, Mr. Goswami sent the delegate a 227-page submission with the reference heading: "Criminal targeting and Victimization of me and my various businesses in Greenwood BC".

24. Neither submission dealt with the substantive issues in the appeal.

25. On September 26, 2018, the delegate returned a telephone call to Ms. Kikla who, instead of discussing the substance of the Complaints, proceeded to express concerns that the delegate had not disclosed the Complainants' "confidential" complaint forms and interview notes from his meeting with the Complainants. She alleged unfair process because the Branch decided to proceed by way of an investigation of the Complaints rather than mediation and adjudication.

26. Although the delegate attempted to address Ms. Kikla's concerns and reassured her that the investigation would provide the Employer a reasonable opportunity to respond to the Complaints, Ms. Kikla was not satisfied.

27. On September 27, 2018, and October 2, 2018, Mr. Goswami copied the delegate e-mails, including several attachments, he sent to CBC regarding a radio broadcast about his businesses in Greenwood, BC and the complaints.

Employer's evidence

28. The delegate reviewed the Employer's voluminous submissions but only set out in the Reasons the following evidence with some association to the substantive issues raised in the Complaints:

- The Complainants signed employment contracts dated December 15, 2017, agreeing to a weekly gross salary, which is based on an hourly rate (per the LMIA Application) multiplied by 40 hours a week plus four percent vacation pay.
- Mr. Vethanayagam arrived in Vancouver on March 13, 2018, and after recovering from his travels, was driven to Greenwood, BC on March 17, 2018.
- Mr. Selvaraj arrived in Vancouver on April 22, 2018, and was transported to Greenwood, BC on April 24, 2018.
- During their employment, the Complainants were provided with accommodations, meals, and a telephone. These expenses were not applied against their wage earnings but appeared on pay slips as a taxable benefit.
- Mr. Goswami and Sunanda Kikla reside in the USA. Mr. Goswami had not travelled to Canada since January 2018 and Ms. Kikla had been away from Canada for most of the year due to health concerns.
- As a result of the absence of both Mr. Goswami and Ms. Kikla from Canada, Mr. Selvaraj oversaw the Pacific Grill and he was responsible to ensure the restaurant prepared three meals a day.
- As Mr. Selvaraj was responsible for scheduling, he chose to work the morning shift to prepare the kitchen and all portions of the meals because Mr. Vethanayagam was unfamiliar with Canadian food items and had limited knowledge of international cuisine. Therefore, Mr. Selvaraj worked 7 hours a day from 6:00 a.m. to 2:00 p.m., with a one-hour unpaid break. Mr. Vethanayagam was scheduled to work from 2:00 p.m. to 10:00 p.m.
- Mr. Selvaraj indicated he and Mr. Vethanayagam would take a day off when an alternate cook, Asif Ahmed, agreed to work.
- According to Mr. Goswami, he was made aware that on five or six occasions the restaurant did not open on time. The restaurant opened sometime between 9:00 a.m. and 11:00 a.m.
- When questioned about the late opening of the restaurant, Mr. Selvaraj explained that his wife had been experiencing medical emergencies in India and he had been staying awake all night to help coordinate medical treatment with her doctors. In the circumstances, he was unable to begin work at 6:00 a.m. Mr. Goswami asked Mr. Selvaraj to arrange coverage for him in order that the restaurant was consistently opened on time.
- According to Mr. Goswami, the Complainants were not required to work 12-hour shifts simultaneously as there were two alternative cooks who also worked at Pacific Grill. He states that any claim of the Complainants that they both worked 12 hours shifts at the same time is "bogus and baseless".

- As for the amount of wages paid by the Employer to the Complainants, Mr. Goswami stated that the Complainants have it wrong. He produced four pay statements for Mr. Vethanayagam and argued that the latter received cash payments from the Employer for each of the four periods represented in the pay statements. At the bottom of each pay slip appears Mr. Vethanayagam's signature acknowledging that he does not dispute the pay slip and has received in full the amount owed.
- Mr. Goswami also produced some additional acknowledgements of cash payments to the Complainants which are documented in a text message. These cash payments are: $750 to Mr. Vethanayagam and $250 to Mr. Selvaraj on July 13, 2017, and $140 to an unidentified person on August 6, 2018.
- Additionally, Mr. Goswami alleges Mr. Vethanayagam and Mr. Selvaraj kept some restaurant cash sales and sent this money to India.
- In contrast to the Complainants' version of how their employment ended with the Employer, Mr. Goswami asserts that the Complainants' exit was very well planned and had nothing to do with the state of their employment with the Employer. He submitted that on July 12, 2018, Mr. Selvaraj applied for a U.S. Non-immigrant Visa for the purpose of opening a restaurant in New York, USA with a friend. On July 31, 2018, Pushkar drove Mr. Selvaraj to Vancouver, BC for a scheduled interview with the US Consulate. The interview took place on August 1, 2018. On the same day, Mr. Goswami stated he received a text message from Mr. Selvaraj indicating his visa application had been denied. Mr. Selvaraj then met Pushkar at the Surrey train station and they drove back to Greenwood arriving at 4:00 a.m. on August 2, 2018. Mr. Selvaraj did not report to work on August 2nd and 3rd because he was unwell and required rest due to his lengthy travel.
- Based on a conversation with another employee, Mr. Goswami understood that Mr. Selvaraj had been considering options to leave Greenwood because he saw a rosier future in Vancouver. He also attempted to induce other employees of the Employer to quit and seek employment in Vancouver.
- On August 7, 2018, neither Mr. Selvaraj nor Mr. Vethanayagam reported to work. They gave a colleague the keys to the restaurant. Later the same morning, Pushkar assisted the Complainants with their luggage and drove them to the closest Greyhound bus station. They informed Pushkar that they would be back in one week.
- While at the bus station, the Complainants spoke to another of the Employer's employees and informed her they were traveling to Vancouver where some friends owned restaurants and could offer them secure employment.
- Since the Complainants' departure on August 7, 2018, the Pacific Grill has been closed.

29. After reviewing the evidence of both the Complainants and the Employer, and after setting out the requirements of the *ESA* in respect of the obligations of the Employer to pay regular wages, overtime wages, statutory holiday pay and vacation pay, the delegate noted that the Employer, despite being issued the Demand, failed to produce all payroll records of the Complainants and therefore, contravened section 28 of the *ESA*. The delegate levied an administrative penalty of $500 against the Employer for this breach.

30. The delegate then went on to note that the Employer supplied only four pay statements for Mr. Vethanayagam covering the period March 15 to May 15, 2018, and none for Mr. Selvaraj. As for the Account Summaries the Employer gave to the Complainants, the delegate notes that these do not establish that all wages earned by the Complainants were paid. The delegate noted that expenses and statutory deductions paid by the Employer on behalf of the Complainants and recorded in the Account Summaries are not wages as defined in the *ESA.* The delegate concluded that Account Summaries are not reliable to substantiate all wages earned by and paid to the Complainants and he must, therefore, determine the Complainants' hours of work, calculate their wages earned under the *ESA*, determine the amount of wages paid to each, and assess whether any wages are still owing to them.

31. In reviewing the evidence of both parties with respect to the hours the Complainants worked, and preferring the evidence of the Complainants over the Employer's, the delegate reasoned as follows:

> Regarding hours of work, the Employer states that Mr. Selvaraj worked from 6:00 a.m. to 2:00 p.m., with an hour unpaid lunch, and Mr. Vethanayagam worked from 2:00 p.m. to 10:00 p.m. It asserts there is no reasonable explanation for why the Complainants would be required to work 12-hour shifts simultaneously because the Pacific Grill employed two full time cooks and two alternate cooks. I have difficulties accepting the Employer's argument and evidence on the basis that the Employer does not have firsthand knowledge of the Complainants' hours of work. Mr. Goswami was not on-site at the Pacific Grill; he left Mr. Selvaraj in charge of scheduling staff. Furthermore, the Employer's argument is not supported by evidence, such as payroll records or staff schedules, that indicates the Complainants never worked 12 hours in a day. For these reasons, I do not accept the Employer's evidence on hours of work.
>
> The Complainants state from the outset of employment they worked 12 hours every day, and from June onward they worked 57 hours a week. While the Employer contested their evidence, overall it did not provide sufficient reasons and supporting evidence to establish their recollection is unreliable. In my view, the available evidence demonstrates it is within the realm of probabilities that the Complainants worked the hours they have reported. Mr. Selvaraj oversaw scheduling so the Pacific Grill could prepare breakfast, lunch and dinner. Kitchen staff started as early as 6:00 a.m. and ended between 10:00 p.m. and 11:00 p.m. While there were one or two casual cooks that may agree to work from time to time, there is no evidence as to when they worked or how long they worked. It's evident that the Pacific Grill was reliant on the Complainants to cook all three meals in a day given that the restaurant shut down immediately after their employment ended. I find on the balance of probabilities that in this circumstance the Complainants worked 12 hours a day at the beginning of their employment and 57 hours a week from June onward.

32. The delegate also noted a few exceptions to Mr. Selvaraj's regular schedule of work when he took time off. In particular, he noted that Mr. Selvaraj agreed that he took a single day off when he was awake most of a night to help his wife in India with health issues. He also agreed that he opened the restaurant a half-hour late on two occasions for a total of one hour of work lost. He also agreed that he did not work on July 31, 2018, and August 1, 2018, due to travel to Vancouver, BC regarding his US Visa application, and he began work 2 hours late on August 2, 2018. However, the delegate did not accept the Employer's claim that Mr. Selvaraj was absent from work on August 2nd and 3rd because Mr. Selvaraj challenged this assertion and the Employer failed to provide any evidence to support its contention.

33. The delegate next dealt with the wages paid to Mr. Vethanayagam. In preferring the evidence of Mr. Vethanayagam over the Employer's, the delegate states:

> The Employer provided four semi-monthly pay statements, for the period of March 15 to May 15, 2018, that indicate Mr. Vethanayagam received cash for net wages owed in each of these pay periods. Mr. Vethanayagam agrees he signed those pay statements but denies receiving four separate payments after each pay period. While Mr. Vethanayagam's signatures suggest the Employer paid him $743.20 at the end of each of those pay periods, this evidence is internally inconsistent with the Employer's Account Summary for Mr. Vethanayagam that illustrates four separate wage payments in the amounts of $1,200, $750, $500 and $500. Given this inconsistency, I am not convinced the Employer's evidence on wages paid is credible. On the other hand, Mr. Vethanayagam says he was paid wages totalling $3,066.10 which is largely congruent with the Employer's Account Summary total of $2,950. (Note: I did not include a payment of $200 in the Employer's total because this amount was for expenses, which is not wages). For this reason, I accept Mr. Vethanayagam's evidence on this matter and find the Employer paid him total wages of $3,066.10.

34. With respect to Mr. Selvaraj, the delegate noted that the Employer's Summary Account for Mr. Selvaraj showed that he was paid wages on four separate occasions in the amounts of $750, $500, $500, and $300, but Mr. Selvaraj said he received $750, $500, $500, and $250. The discrepancy is with respect to the last payment: whether it was for $250 or $300. In preferring the evidence of Mr. Selvaraj, the delegate states "the amount paid was $250 on the basis that of an undated text message between Mr. Goswami and Mr. Vethanayagam confirms Mr. Selvaraj was given $250 cash from the restaurant till on July 13, 2017." In the result, the delegate concluded that the total wages paid by the Employer to Mr. Selvaraj is $2,000.

35. With respect to the Employer's contention that the Complainants were paid additional wages because they kept cash sales from the restaurant, the delegate rejected this assertion for the simple reason that there was no corroborating evidence from the Employer to substantiate this allegation.

36. However, the delegate noted that the four pay statements signed by Mr. Vethanayagam that indicate $50.00 was withheld from his wages for "account expenses" paid by the employer in each pay period, were lawful deductions under section 22 of the *ESA* because the signed pay statements represented a written assignment of wages to meet a credit obligation. In the circumstances, when calculating the amount of wages Mr. Vethanayagam was owed, the delegate credited the Employer the full $200 ($50 x 4) for wages paid to Mr. Vethanayagam.

37. In concluding that each Complainant was owed more than the amount of wages paid to them, the delegate based his analysis on the following reasoning and went on to set out the wages owed to each Complainant in separate summary sheets in the Determination:

> In sum, wages earned by each Complainant will generally encompass 40 hours of pay at the regular wage rate, followed by 44 hours of pay at time-and-one-half the regular wage rate. From June onward each Complainant's weekly earnings should have been 40 hours at the regular wage rate, followed by 17 hours of pay at one-and-one-half the regular wage rate. Statutory holiday pay and vacation pay are also amounts owed by the Employer.

38. In the case of Mr. Vethanayagam, the delegate determined the total of regular and overtime wages, compensation for length of service, and vacation pay earned totaled $28,805.40. He then went on to

subtract from the said amount $3,066.10 his Employer paid to Mr. Vethanayagam and four authorized deductions of $50 ($200) leaving the balance owing to Mr. Vethanayagam of $25,539.30 plus interest of $401.35 for a total of $25,940.65.

39. In the case of Mr. Selvaraj, the delegate determined that his regular and overtime wages, statutory holiday pay, compensation for length of service, and vacation pay amounted to $20,712.12. The delegate then subtracted from this amount the $2,000 the Employer paid Mr. Selvaraj, leaving the balance owing to Mr. Selvaraj of $18,712.12 and interest of $294.07 for a total of $19,006.19.

40. As noted above, included in the delegate's calculation is compensation for length of service for each Complainant. This is because the delegate concluded that the Employer was liable under section 63 of the *ESA* to pay the Complainants compensation for length of service as their employment was terminated pursuant to section 66 of the *ESA* since the Employer "substantially altered" their "condition of employment". The delegate reasoned as follows:

> The Complainants' employment agreements specify that wages would be payable semimonthly. Mr. Vethanayagam had worked for almost five months and was given four separate wage payments received in May or July. Mr. Selvaraj had worked for over three months and was provided four wage payments in May or July. Clearly, there were months where the Complainants were not paid any wages. Late or non-payment of wages are alterations that go to the root of the employment relationship. It would be unreasonable to expect employees to continue to attend work when an employer is failing to pay wages in a timely manner per the contract of employment and the Act. Under this circumstance, I find a condition of employment, namely paying wages on a semi-monthly basis, was substantially altered by the Employer and, as such, the Complainants' employment was terminated. It follows that I find the Employer is liable to pay each Complainant one week's compensation for length of service.

41. The delegate also levied seven administrative penalties of $500 each against the Employer for contraventions of sections 17, 18, 28, 40, 46, 58, and 63 of the *ESA*.

SUBMISSIONS OF THE EMPLOYER

42. As indicated in the Overview, the Employer has checked off all three grounds of appeal under section 112(1) of the *ESA* in the Appeal Form, namely, that the Director erred in law and breached 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. However, in the 850 plus pages of submissions and documents presented by the Employer in support of the appeal, there does not appear to be any semblance of order between the submissions and grounds of appeal invoked. The main focus of the argument of the Employer is that the delegates of the Director involved in the processing of numerous employee complainants against various businesses operated by Mr. Goswami and Ms. Kikla were biased, unfair, and colluded with one another with a view to disadvantaging their businesses. This theme singularly dominates the voluminous submissions filed by the Employer in this appeal.

43. The documents that are attached to the written submissions to a large extent include records and determinations made by the Director in numerous other complaints filed by employees in businesses Mr. Goswami and Ms. Kikla are or have been associated with. While I have carefully read all of these

documents and submissions, I do not find it necessary to reiterate, in copious detail, the contents. Instead, I have opted to summarize the nature of the submissions below.

44. In their submissions, Mr. Goswami and Ms. Kikla allege, among other things:

- The Director withheld from the Employer the "[o]riginal complaints" or "true complaint(s)" the Complainants filed with the Branch.
- The delegates of the Director or staff at the Branch "conspired, committed acts of Fraud, False Pretense, Obstruction of Justice, Falsification of evidence and true facts … in rendering a biased and premeditated decision."
- The delegates "[c]reated [f]alse evidence" and "committed unlawful acts to hurt the [b]usinesses of the Appellant in a carefully plotted acts of fraud and false pretense to cause damage".
- The Branch did not disclose to the appellant the evidence that was collected in the investigation of the Complainants and decided to proceed by way of an investigation and not mediation or arbitration thereby breaching the "laws of 'Fair Process & Natural Justice'".
- The Director "violated the fair process" and was "biased" throughout the Complaint process and "exceeded [its] jurisdiction and collected evidence without disclosure to [the] appellant."
- A specific delegate of the director (who shall remain nameless here as there is no evidentiary foundation at all to substantiate this allegation) was the "master mind behind this whole scam of false complaints" filed in 2016 to 2018 against various businesses of Mr. Goswami and Ms. Kikla.
- The Branch set hearings of complaints at a time when it is aware that the employer was away or unavailable.
- The "incompetent appeal process … asks the employer to give the facts and merits of their claim at the time of filing an appeal" when the employer "has not been given any records that the person deciding the [Appeal] will have."
- The "corrupt employees" at the Branch timed disclosure of documents.
- The Tribunal, in another case involving a company Ms. Kikla was associated with, made it look like her documents arrived late thereby giving the them a reason "to not deal with the appeal" and let the original decision stand.
- A delegate of the director "spread[ ] the CBC article" that portrayed Mr. Goswami and his businesses in a negative light to his colleagues at the Branch.
- One or more delegates at the Branch recreated the timeline of some employee complaints against a company, Global Training Consultants Ltd., in which both Ms. Kikla and Mr. Goswami had an interest, which were otherwise out of time.
- The delegates were involved in arranging the arrest of Ms. Kikla's son, Sameer, by the Midway RCMP, with "no valid reason" on "false grounds" and knew Ms. Kikla would be headed to court to deal with her son's matter and miss a scheduled telephone hearing scheduled by the Branch in another matter on the same date.

- The RCMP were falsely arresting Sameer "to keep [Ms. Kikla] in a mental trauma".
- The "entire team dealing with … complaints" against the companies Ms. Kikla was associated with were "targeting" her.
- Some of the delegates "met at [the] Copper Eagle Bakery in Greenwood … [and] were deciding over coffee how to deny [Mr. Goswami] [an opportunity to mediate]" complaints.
- The delegates "were coordinating to find reasons to keep [Ms. Kikla] shut".
- Various governmental agencies and their representatives worked in coordination with a view to injuring Mr. Goswami's and Ms. Kikla's businesses or business interests.

45. The Employer also advances numerous submissions relating to the immigration of the Complainants to Canada and whether they should have been allowed. The submissions also include, in part, the immigration history of Mr. Selvaraj to U.S. While I have reviewed all of the submissions, I do not find it necessary to reiterate them here beyond the cursory mention I have made.

46. The Employer has also included in the appeal lengthy submission of Mr. Goswami dated September 13, 2018, to Mr. Olivet Carullo ("Mr. Carullo"), the Immigrant Settlement Worker in Kelowna, requesting that the latter withdraw false claims against Mr. Goswami's business in his letter of August 9, 2016, to Citizenship and Immigration Canada ("CIC"). These submissions were made to the delegate in the investigation of the Complaints and are resubmitted by the Employer in the appeal.

47. In his letter to CIC on August 9, 2019, Mr. Carullo delineated his understanding of the treatment Mr. Selvaraj was afforded by the Employer and requested that Mr. Selvaraj be issued an open work permit. Mr. Goswami contends that Mr. Carullo makes several false allegations in the letter against him and his businesses and he wants Mr. Carullo to withdraw these allegations. While I do not find it necessary to reiterate Mr. Goswami's submissions here, as indicated, the submissions were presented to the delegate during the investigation of the Complaints and relevant parts of the submissions are noted in the Reasons. I have also summarized the same under the subheading *Employers evidence* under "Background and Reasons for the Determination" above.

48. The Employer also includes in the appeal submissions Mr. Goswami's written submissions dated September 14, 2018, to the delegate. These submissions contain the reference heading "Criminal targeting and Victimization of me and my various businesses in Greenwood BC". The submissions were also presented to the delegate during the investigation of the Complaints and the Employer resubmits them in the appeal of the Determination. The submissions do not deal with the substantive issues in the Complaints, but focus on the treatment Mr. Goswami and Ms. Kikla have been afforded by the Director and his delegates in numerous determinations made by the Director in complaints lodged by employees in other businesses of Mr. Goswami and Ms. Kikla.

49. In his submissions, Mr. Goswami appears to repeat some of the submissions he made in his earlier submissions. More particularly, Mr. Goswami submits that the Director and his delegates "rendered various determinations against my various companies without giving any opportunity for mediation or due process which caused irreparable harm to the businesses." He also contends that most of the complaints against his companies were filed online by the complainants but not disclosed to him by the Director's delegates. Instead, he states, the delegates involved in the adjudication of the complaints

"fabricated" and created "second altered complaints [in paper form] to render predetermined and biased judgment[s]". He states there was a "well planned" "strategy" on the part of the delegates to deny mediation in all matters and to render "predetermined decisions" to cause him "financial loss" and "maximum damage" to his "financial strength and credit score" in order to interfere with his ability to seek refinancing of any of his assets. He also submits that the Director prepared '[l]iens and documents" in advance of the determinations and therefore, biased against him and his businesses.

50. Mr. Goswami also includes in his submissions excerpts from a string of email exchanges between Ms. Kikla and another delegate involving employment standards matters unrelated to the Determination wherein Ms. Kikla questions why the Branch was scheduling hearings and not mediation. He also includes the delegate's response to Ms. Kikla that the "[*ESA*] does not require that a mediation occur" and the Director has the discretion to proceed based on "the best process for each complaint" which, in the matters in question accord with one of the purposes of the *ESA*, namely, to ensure "fair and efficient procedures for resolving disputes". He contends that the delegate's response to Ms. Kikla shows unfairness in the process employed by the Director in dealing with the complaints and that "regular process" of mediation should have been employed before proceeding to a hearing.

51. He also submits that the Director's delegates are involved in "some serious criminal activity in order to hurt me, my family, my businesses and [to] cause irreparable financial damage to my business". He suggests that this is done "to please the political agenda of some corrupt politicians". He also states that "[b]y victimization and categorically targeting my businesses with CBC report[er] Chris Walker" the Director has caused "damage [to] the economy and employment opportunities of many Canadian[s] and the growth of the region".

52. He also submits that the Director's delegates have breached "every count of Privacy law" and have "'actively and collectively frauded (sic) me and my businesses in the name of false labour complaints … [and] predetermined biased determinations". He repeats that the delegates have "actively withheld evidence, documents and true facts" in "these false complaint[s] in order to fraud (sic) me and my businesses". He states the Branch has employed its discretionary power under false pretenses to damage his businesses. He also alleges that there is some "joint conspiracy" between Delta Immigration and the Branch to start false claims against his businesses.

ANALYSIS

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

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination; and

(c) evidence has become available that was not available at the time the determination was being made.

54. The Employer has invoked all three grounds of appeal in section 112(1). The burden is on the Employer to persuade the Tribunal that there is an error in the Determination on any one of these statutory grounds.

55. It is important to note that the grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the tribunal reach a different factual conclusion than was made by the director unless the Director's findings raise an error of law: see *Britco Structures Ltd.* BC EST # D260/03.

Error of Law

56. As concerns the "error of law" ground of appeal, in *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defined error of law as follows:

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.

57. Having carefully reviewed the Reasons, the Record, and the appeal submissions of the Employer, I am not at all persuaded that the Employer has established an error of law as defined in *Gemex Developments Corp., supra*. More particularly, I do not find the delegate to have misinterpreted or misapplied any relevant sections of the *ESA* or applicable principle of general law in making the Determination. I also do not find the Director adopted a method of assessment which is wrong in principle or acted on a view of the facts which could not reasonably be entertained. In the case of the latter, the Tribunal in *Britco Structures Ltd.* (BC EST # D260/03) quoting from the decision of the British Columbia Supreme Court in *Delsom Estate Ltd. v. Assessor of Area 11 – Richmond/Delta*, [2000] B.C.J. No. 331, stated that error of law, in these circumstances, is only found where it is shown:

> …that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word 'could'…

58. In this case, the delegate considered the evidence of both the Employer and the Complainants with respect to all matters in dispute in the Complaints including the allegations of failure of the Employer to pay regular wages, overtime wages, statutory holiday pay, vacation pay, and termination notice or pay in lieu thereof. The delegate's task was to reach a fair and reasonable conclusion based on the best evidence available, which he found to be that of the Complainants, especially in light of the failure of the Employer to maintain payroll records. I do not find that the delegate acted without any evidence, nor did he act on a view of facts that could not reasonably be entertained with respect to any of the questions he considered in the Complaints. There is nothing in the voluminous submissions of the Employer to persuade me that a reasonable person, acting judicially and properly instructed as to the relevant law, could not have come to the same determination as the delegate. It is also noteworthy that in this case,

as summarized in paragraphs 29 to 40 of this decision above, the delegate delineated the evidence that supported his findings of fact in a reasonably clear manner. The Reasons show that the delegate did give consideration to all relevant evidence of the parties but preferred the Complainants evidence which it was open for him to do. I do not find the delegate erred in law in any respect in the Determination, and there is simply no basis upon which the error of law ground can succeed.

Natural Justice

59. The Employer has also checked off the "natural justice" ground of appeal in the Appeal Form.

60. Natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent-decision maker (see *Re: 607730 B.C. Ltd. c.o.b. English Inn & Resort*, BC EST # D055/05).

61. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal elaborated 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 #D 050/96).

62. The onus is on the Employer to show that the Director breached the principles of natural justice in making the Determination. However, I do not find anything in the Employer's submissions or the Director's record that supports the natural justice ground of appeal. The record amply shows that the delegate provided the Employer with particulars of the Complaints during the investigation process. The Record also shows that both Ms. Kikla and Mr. Goswami participated in the delegate's fact-finding process during the investigation and made submissions. However, there are numerous serious allegations the Employer is advancing in the appeal including, but not limited to, bias, fraud, conspiracy to injure the Employer's business, failure to disclose "original complaints", fabricating evidence, colluding between delegates to deny the Employer fair process for adjudication of the Complaint, denying the Employer an opportunity to mediate the Complaints, and other serious allegations which I have delineated in paragraphs 44 to 52 inclusive above.

63. I find that none of these allegations are supported with any corroborating evidence. The allegation of bias levelled by the Employer against the delegate or the Director, for example, must be proven on the evidence. In *Dusty Investments Ltd. d.b.a. Honda North,* (BC EST # D043/99) (Reconsideration of BC EST # D101/98), the Tribunal stated that the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one, and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: *see A.B. Lumber Co. Ltd.* and *North Coast Forest Products Ltd. v. B. C. Labour Relations Board* and another, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

64. The Tribunal has repeatedly stated that an allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the party alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

65. In R. v. S. (R.D.), [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the **personal** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

66. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias. In this case, the submissions of the Employer and its representatives, Ms. Kikla and Mr. Goswami, do no more than make bare allegations of bias on the part of the Director or his delegate. While they have included numerous records and determinations of the Director in complaints lodged by former employees of other businesses that Mr. Goswami and Ms. Kikla were or are associated with, none of the materials, in the slightest, substantiates the serious allegation of the Employer that the Director or his delegate was biased in dealing with this (or any other) case. The Employer, in my view, has clearly failed to meet its burden of proof as there is simply no clear objective evidence from which it can reasonably be found the Director was disposed to hold an adverse view of the Employer at any stage of the investigation process leading to the Determination.

67. There is also nothing in the appeal submissions of the Employer that objectively supports any of the other very serious allegations of the Employer against the Director and his delegates, including but not limited to allegations of fraud, corruption, fabrication of complaints, and conspiracy to injure the Employer's business.

68. It is plain wrong for the Employer and its representatives, Ms. Kikla and Mr. Goswami, with impunity, to level serious allegations that call into question the personal integrity of the delegates and the integrity of the employment standards complaints process. I reiterate that there is absolutely nothing in the appeal submissions of the Employer that remotely supports the allegations of Mr. Goswami and Ms. Kikla summarized in paragraph 44 above.

69. With respect to the submission of Mr. Goswami and Ms. Kikla that the Director denied the Employer fair process by opting to decide the Complaints by way of an investigation and not first proceeding with mediation, I reject this argument. The Director has the discretion to decide whether a matter should be

mediated, adjudicated, or investigated. In exercising this discretion, the Director should be guided by the purposes of the *ESA*. In this case, the Director or his delegate was so guided. More particularly, I find the decision of the Director to proceed by way of investigation was consistent with section 2(d) of the *ESA*, namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*.

70. In sum, I find there is no basis upon which the natural justice ground of appeal can succeed.

New Evidence

71. The Employer has also advanced the "new evidence" ground of appeal.

72. Admission of "new evidence" is discretionary under section 112(1)(c). In *Bruce Davies and others*, *Directors* or *Officers of Merilus Technologies Inc*., BC EST # D171/03, the Tribunal set out four (4) conjunctive requirements which must be met before new evidence will be considered on appeal. These requirements are as follows:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

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

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

73. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470* B.C. *Ltd*. *carrying on business as Michael Allen Painting*, BC EST # D096/07; *Kaiser Stables* Ltd., BC EST # D058/97).

74. In this appeal, the Company has not submitted any evidence that satisfies the requirements for accepting "new evidence" in *Merilus Technologies, supra*. Two very lengthy submissions of Mr. Goswami dated September 13, 2018, and September 14, 2018, were previously submitted by him in the investigation of the Complaints and again resubmitted in the appeal. The third lengthy submission dated November 7, 2018, by Ms. Kikla, followed the first two. All of these very lengthy submissions including the accompanying documents predate the Determination and were either submitted or could have been submitted to the delegate before the Determination was made.

75. I also find that most of the submissions and materials referred to in the above submissions relate to complaints of other employees in different businesses operated by Mr. Goswami and Ms. Kikla or contain matters not relevant to any material issues arising from the Complaints. To the extent that the materials contained any relevant evidence, the delegate did identify it in the Reasons (see paragraph 28 above) and considered the same in his deliberations.

76. I also do not find the evidence adduced by Mr. Goswami and Ms. Kikla in the appeal, as summarized in paragraphs 44 to 52 above, has high potential probative value, in the sense that, if believed, it would have led the Director to a different conclusion on any material issue.

77. In summary, the evidence adduced by the Employer does not satisfy several of the conditions necessary to be allowed and considered as "new evidence" under this ground of appeal. In the result, I find here is no merit in this ground of appeal.

78. Having reviewed the merits of the appeal and found none, I dismiss the appeal under section 114 (1)(f) of the *ESA*.

ORDER

79. Pursuant to section 115 of the *ESA,* I confirm the Determination made on January 11, 2019, together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal