Citation: Hilda Kariuki and Pin Services Ltd. (Re)
2020 BCEST 20

Appeals

- by -

Hilda Kariuki
("Kariuki")

- and by –

Pin Services Ltd.
("Pin Services")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2019/198 and 2019/206

DATE OF DECISION: March 12, 2020

DECISION

SUBMISSIONS

Hilda Kariuki	on her own behalf
Mark W. Hundleby	counsel for Pin Services Ltd.

INTRODUCTION

1. On September 27, 2018, Hilda Kariuki ("Kariuki") filed a complaint under section 74 of the *Employment Standards Act* (the "*ESA*") claiming an estimated $93,000 in unpaid wages allegedly owed to her by Pin Services Ltd. ("Pin Services"). In due course, this complaint was investigated by Dan Armstrong, a delegate of the Director of Employment Standards (the "delegate"), who issued the Determination dated November 5, 2019, that is now under appeal in these proceedings. The delegate also issued written "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

2. Ms. Kariuki (EST File No. 2019/198) and Pin Services (EST File No. 2019/206) have both appealed the Determination. These reasons for decision address both appeals.

3. Ms. Kariuki says that the delegate erred in law in making the Determination (see section 112(1)(a) of the *ESA*). More particularly, she says that in light of recent legislative changes to the *ESA*, which among other things extended the wage recovery period from 6 months to "12 months before the earlier of the date of the complaint or the termination of the employment", she queries "why my case against my employer did not meet the criteria of 12 months". This latter change was effected by section 29 of the *Employment Standards Amendment Act, 2019*, which was given Royal Assent on May 30, 2019.

4. Ms. Kariuki's submission on appeal does not set out any argument regarding her ground of appeal; rather, she simply asks the Tribunal to "review the assessment made in regards to this aspect of the law and application."

5. Pin Services' appeal is predicated on two of the three statutory grounds of appeal, namely, that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (sections 112(1)(a) and (b) of the *ESA*). With respect to the latter "natural justice" ground, Pin Service says that the manner in which the delegate conducted the investigation raises a reasonable apprehension of bias on the delegate's part, particularly since he prejudged a critical issue – whether Ms. Kariuki was an employee or an independent contractor. Pin Services also says that the delegate failed to afford it a reasonable opportunity to respond to the evidence provided by Ms. Kariuki during the course of the investigation.

6. Pin Services says that the delegate erred in law in finding that Ms. Kariuki was an employee rather than an independent contractor and, more generally, erred in finding facts and in interpreting the services agreement between the parties (this agreement is entitled "Associate Agreement September 28 2017").

THE DETERMINATION

7. As previously noted, Ms. Kariuki filed an unpaid wage complaint on September 27, 2018. The complaint was rather fanciful on its face (unless Ms. Kariuki simply made a transcription error); she claimed to have worked 40 hours per day, 5 days per week, for a total of 200 working hours each week. In any event, in her complaint, Ms. Kariuki alleged that she worked for Mr. Eric Jordan ("Jordan") and Pin Services as a "valuation analyst" from September 28, 2017, to September 25, 2018. Mr. Jordan is the sole director of Pin Services. I understand that Pin Services operates a business valuation/appraisal firm and its principal, Mr. Jordan, has authored and self-published a book regarding the business valuation process. Ms. Kariuki stated that she quit her employment.

8. As noted in the delegate's reasons, at page R2, Ms. Kariuki's complaint "was initially scheduled to proceed by way of adjudication, [but] on the day of the hearing it was converted to an investigation [and] [b]oth parties were then offered an opportunity to forward any additional evidence they believed to be relevant to this matter."

9. Ms. Kariuki stated that she entered into an agreement with Mr. Jordan and Pin Services on September 28, 2017. This agreement, entitled "Associate Agreement September 28, 2017" (the "Associate Agreement"), between Mr. Jordan and Pin Services as "Licensor" and Ms. Kariuki as "Licensee", provided that Ms. Kariuki would be trained to conduct "business valuations on a split fee basis, 50/50 minus some costs before split". The Associate Agreement stated that Ms. Kariuki would be "working as an independent contractor under license, seeking work and setting her own working hours". The Associate Agreement also obliged Ms. Kariuki to purchase Mr. Jordan's book: "Licensee is agreeing to purchase and distribute at least 15,000 promotional books authored by Eric Jordan '25 Factors Affecting Business Valuation'. These books will be sold at cost which is expected to be in the range of one dollar Canadian delivered to Vancouver. GST will of course be extra and the licensee will need to have her own GST number."

10. Under the Associate Agreement, Ms. Kariuki was required to provide a "comfort level deposit" of $12,000 (refundable if certain conditions were satisfied). Ms. Kariuki transferred, in total, $8,000 to Pin Services as partial payment of this latter deposit. The Associate Agreement also included a confidentiality provision and a non-solicitation covenant. Although Ms. Kariuki claimed she had generated nearly $50,000 in fees payable under the Associate Agreement, she was only paid $15,525 during the one-year period that she worked for Pin Services. Ms. Kariuki ended her relationship with Pin Services, providing two weeks' notice, by an e-mail dated September 14, 2018. She asserted that "this decision was made as a result of her frustration with what she felt was a failure to provide her with wages earned" (delegate's reasons, page R6).

11. Pin Services and Mr. Jordan maintained that there was no employment relationship between the parties. Pin Services also argued that since the *ESA* did not apply: i) Ms. Kariuki was not entitled to vacation pay; ii) the monies paid by her to Pin Services did not constitute an unlawful charge under section 10 of the *ESA*; and iii) any expenses Ms. Kariuki incurred were legitimate business expenses paid on her own account as an independent contractor.

12. The delegate made the following findings:

- "…under the terms of the Associate Agreement, Pin Services Ltd. was an employer and…Ms. Kariuki performed work as an employee of Pin Services" (delegate's reasons, page R13).
- With respect to the matter of unpaid wages, the delegate determined that Ms. Kariuki earned $41,081, was paid $15,525, and was thus owed $25,556.
- The delegate held that the $12,000 "comfort level deposit" constituted a fee paid in contravention of section 10 of the *ESA* (fees paid for hiring or providing information). Ordinarily, it would follow that the amount paid by Ms. Kariuki ($8,000) would be the subject of a wage recovery order under section 10(3). However, the delegate did not make a wage recovery order because the complaint was untimely with respect to this matter (see page R20).
- The delegate further determined that Pin Services contravened section 21 of the *ESA* by requiring Ms. Kariuki to pay certain business costs including such things as postage, shipping/transportation costs, and printing costs, totalling $4,095.90.
- Although Ms. Kariuki submitted 2 weeks' notice of resignation, the delegate held that the circumstances surrounding the end of Ms. Kariuki's employment fell within the section 66 "deemed termination" provision since Pin Services failed to pay "a significant amount of wages when they were required to be paid" (page R22). Accordingly, she was entitled to one week's wages as compensation for length of service ($951.56).
- Finally, the delegate awarded 4% vacation pay on Ms. Kariuki's unpaid wages ($1,681.30), section 88 interest ($1,392.89), and he levied six separate $500 monetary penalties (see section 98) based on Pin Services' contraventions of sections 17, 18, 21, 28, 58, and 63 of the *ESA*.

13. I now turn to each party's appeal.

MS. KARIUKI'S APPEAL (EST FILE NO. 2019/198)

14. Ms. Kariuki says that her unpaid wages ought to have been determined based on a 12-month, rather than a 6-month, wage recovery period. The only wage claim the delegate limited based on a 6-month limitation period was in regard to her section 10 claim for recovery of $8,000 paid toward the so-called "comfort level deposit". Ms. Kariuki paid this latter amount, in two installments, on September 28 and 30, 2017, respectively. Ms. Kariuki's employment ended, as determined under section 66, on September 25, 2018 (delegate's reasons, page R22). Her section 74 complaint was filed on September 27, 2018.

15. Ms. Kariuki's complaint was, in most respects, timely under section 74(3) of the *ESA*, as it was filed only two days after her employment ended. However, with respect to a complaint concerning an alleged section 10 contravention, section 74(4) applies: "A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention." In this case, the delegate determined that Ms. Kariuki's complaint, as it concerned section 10, was not timely (page R20):

> …a complaint that a person has contravened a requirement of section 10 must be delivered under subsection [*sic*] within 6 months after the date of the contravention. In these circumstances, the "date of contravention" is the date on which the incident contrary to the Act occurred. I find that the relevant incidents occurred on September 28 and 30, 2017. Ms. Kariuki's complaint was received on September 27, 2018. Accordingly, her complaint was not received within six months, and the hiring fees which Ms. Kariuki's paid to Pin Services is [*sic*] not recoverable under the Act.

16. Section 76(3)(a) states that a complaint may be dismissed for various reasons, including if it was not filed within the section 74(4) time limit, and this provision appears to have been the sole basis for the delegate's decision to disallow Ms. Kariuki's section 10 claim. In this case, the combined effect of section 74(4) and 76(3)(a) seemingly constitute a complete answer to Ms. Kariuki's appeal. The delegate did not necessarily err in law when he refused to make a wage recovery order with respect to the $8,000 paid toward the "comfort level deposit" given by Ms. Kariuki to Pin Services.

17. However, there is another consideration that must be addressed, arising from the B.C. Court of Appeal's decision in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553. *Karbalaeiali* concerned an untimely unpaid wage complaint that the Director of Employment Standards dismissed because it was untimely under section 74(3). The Tribunal upheld this dismissal, both on appeal and again on further reconsideration. The BCSC concluded, on judicial review, that section 76 created a residual obligation on the part of the Director to consider whether to continue to investigate or adjudicate a complaint despite its untimeliness. The B.C. Court of Appeal agreed with that position. The appeal court held, at paras. 11 – 12, as follows:

> While the Tribunal rightly stated that the *ESA* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, even though a written complaint is delivered more than six months after the termination of an employee's employment, the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so. In other words, s. 74 does not, as the Tribunal said, preclude the Director's discretion to accept a complaint.
>
> The question before the Tribunal was not whether the employee's complaint was statute-barred but whether the Director's delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate's discretion. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised.

18. In this case, the delegate, as appears clear from his reasons quoted above, never went beyond finding that the complaint, as it concerned section 10, was untimely. The delegate did not consider, as he was obliged to do under *Karbalaeiali*, whether, as an exercise of discretion, he should nevertheless accept and adjudicate Ms. Kariuki's section 10 claim. While I acknowledge that *Karbalaeiali* concerned the section 74(3) complaint period, I see no basis for distinguishing the court's comments simply because this matter concerns the section 74(4) complaint period. In my view, the court's comments in *Karbalaeiali* apply with equal force regarding the latter limitation period.

19. Accordingly, since the delegate never turned his mind to his discretionary authority to proceed with an untimely section 10 complaint, I am of the view the appropriate order is to refer that matter back to the delegate, under section 114(2)(a), for his further consideration. In making this order, I wish to be clear that I am not expressing any view regarding whether, as a matter of the delegate's discretionary authority, he should adjudicate Ms. Kariuki's section 10 claim on its merits. I am only directing the delegate to consider whether he should, as a matter of his discretionary authority, proceed to adjudicate Ms. Kariuki's section 10 claim on its merits.

20. Simply for the sake of completeness, and since Ms. Kariuki raised the matter, I will address Ms. Kariuki's position that her section 10 claim is governed by a 12-month wage recovery period, as is now stipulated in section 80(1)(a) of the *ESA*. When Ms. Kariuki's employment commenced on September 28, 2017, this latter provision read as follows: "The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment". When her employment ended, the wage recovery period had been extended to 12 months, following the enactment of the *Employment Standards Amendment Act*, 2019 (the "*2019 Amendment Act*), which came into effect on May 30, 2019. Although the *2019 Amendment Act* extended the presumptive wage recovery period from 6 to 12 months, it did *not* change the fact that a claim for recovery of fees paid contrary to section 10 continued to be governed by a 6-month complaint period. That being the case, her September 27, 2018 complaint was untimely as it concerned her section 10 claim and, subject to the discretionary considerations discussed above, could be properly dismissed under section 76(3)(a).

21. I now turn to Pin Services' appeal.

PIN SERVICES' APPEAL (EST FILE NO. 2019/206)

22. Pin Services says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

Natural Justice

23. Pin Services asserts that the delegate prejudged the issue regarding whether Ms. Kariuki was an employee or an independent contractor and, during the course of the investigation, "declined to hear evidence going to whether the Complainant was an employee or not, and conducted the investigatory hearing on the assumption that he would find the Complainant was an employee". Pin Services says that the delegate conveyed his opinion regarding Ms. Kariuki's status "at the virtual commencement of the investigatory hearing" and "[w]ithin minutes after the telephone conference commenced, prior to hearing any evidence or asking any questions". Pin Services says that although "the Delegate provided a verbal opportunity and a written opportunity…to make submissions on whether the Complainant was an employee or not…those submissions were made in the knowledge that the Delegate had already pre-formed his opinion and thus the submissions were made with the suspicion that the evidence and arguments subsequently provided would be viewed with closed-mindedness."

24. Pin Services further says that although it does not challenge the delegate's decision to proceed by way of an investigation, rather than an oral complaint hearing ("Pin Services takes no issue with that decision"),

it was nonetheless denied the opportunity to cross-examine Ms. Kariuki in a case where it wished to challenge her veracity.

25. Finally, Pin Services say that the delegate failed to adequately comply with section 77 of the *ESA*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." Among other things, Pin Services says: i) that it was not provided with the evidence that Ms. Kariuki submitted to the delegate; or ii) given an opportunity to respond to the substance of her evidence; and iii) was not afforded a fair opportunity to address section 66 and Ms. Kariuki's possible entitlement to section 63 compensation for length of service.

26. The section 112(5) record in this matter consists of 332 pages. The Tribunal provided both parties with a copy of this record and both agreed that the record was complete. The record shows that there was extensive communication between the delegate and Pin Services (and its legal counsel) during the course of the investigation. While Pin Services contested the delegate's preliminary findings regarding whether there was an employment relationship, it would appear that all of the arguments that Pin Services advanced regarding the status question were considered by the delegate in his reasons. Pin Services, through its legal counsel, also provided submissions regarding Ms. Kariuki's unpaid wage entitlements and, similarly, these submissions were addressed in the delegate's reasons. Following my review of the record, I am unable to conclude that the delegate failed to hear and consider the evidence and argument that Pin Services put forward during the investigation, or that the delegate failed to provide to Pin Services sufficient particulars regarding Ms. Kariuki's various claims.

27. The delegate provided detailed reasons for his conclusions both as to Ms. Kariuki's status and with respect to her various unpaid wage entitlements. Pin Services rejects the delegate's findings, but I am unable to conclude that the delegate rejected Pin Services' position because he was predisposed against its position. While it is true that the delegate advised Pin Services in writing by letter dated June 12, 2019 (prior to the issuance of the Determination), that he had come the preliminary view that there was an employment relationship between the parties, the delegate's June 12 letter set out, in detail, his reasons for coming to that view. The delegate also invited Pin Services to provide whatever further evidence or argument it wished to have the delegate consider before a final decision was reached. By way of reply, Pin Services' legal counsel sent a letter to the delegate, dated June 18, 2019, indicating that while he disagreed with the delegate's view regarding Ms. Kariuki's status, nevertheless "PIN Services Ltd. does not have any additional evidence to provide at this time".

28. I should further note that the record shows the delegate also provided Pin Services with letters setting out his preliminary views regarding the other issues in dispute and, in each case, Pin Services was invited to reply (which it did). Although by the very nature of an investigation compared to an oral complaint hearing, the parties are not afforded an opportunity to cross-examine each other, the record shows that the delegate provided Pin Services with sufficient information regarding the nature of Ms. Kariuki's claims so as to afford it a reasonable opportunity to respond to those claims (and it did so).

29. Pin Services alleges that the delegate expressed the view, almost at the outset of the adjudication of this matter, that he considered Ms. Kariuki to be an employee. The delegate's opinion was apparently reached after only a "cursory review of the documents provided by the parties". This allegation stands as a bald assertion and the delegate, as yet, has not been given an opportunity to respond to it. It may be that the delegate expressed a preliminary view about Ms. Kariuki's status, perhaps to facilitate a discussion about

the resolution of her complaint, or perhaps in an effort to redefine the issues in dispute. In any event, if the delegate made such a statement, I am not persuaded that such a statement necessarily suggests that the delegate was biased against Pin Services. That said, I do not believe, as a general practice, that a decision-maker should express a view about an issue in dispute before the parties have fully submitted their evidence and argument relating to that issue.

30. The record shows that on April 4, 2019, the delegate sent a letter to Pin Services setting out his preliminary view – and why he came to that view – that Ms. Kariuki was an employee. The delegate requested that Pin Services provide any further evidence or argument regarding Ms. Kariuki's status by April 11, 2019. On April 18, 2019, Pin Services' legal counsel replied setting out his argument that Ms. Kariuki was an independent contractor. In his April 18 letter, counsel also objected to the delegate's statement about Ms. Kariuki's status that was apparently communicated to Pin Services more or less at the outset of the aborted complaint hearing. However, counsel did not ask the delegate to recuse himself and, so far as I can determine, counsel never made any sort of application to the Director of Employment Standards to have the delegate removed from the file. Accordingly, it would appear that Pin Services, despite its objection to the delegate's comment about Ms. Kariuki's status, was nonetheless content to have the delegate continue to hear and decide the dispute.

31. By letter dated June 12, 2019, the delegate replied to Pin Services, responding to the further evidence and argument it had submitted and, ultimately, reiterating his position that Ms. Kariuki was an employee as defined in the *ESA*. The delegate asked Pin Services to file a final reply if it wished to do so, and Pin Services, through its legal counsel, submitted further evidence and argument concerning Ms. Kariuki's claims by way of separate letters to the delegate dated August 29, September 6 and 24, and October 18, 2019.

32. Even if the delegate communicated a view, at a very early stage in the adjudication of this matter, that Ms. Kariuki was an employee, I am unable to conclude that such a preliminary opinion, apparently expressed on the basis of information that the delegate had in hand as of that point in time, reflected bias on his part. Pin Services was later given a full opportunity to provide additional evidence and argument regarding Ms. Kariuki's status, and the delegate's reasons fully address the evidence relating to Ms. Kariuki's status. In my view, the delegate's determination that Ms. Kariuki was an employee is entirely reasonable given the available evidence, considered in light of the relevant provisions of the *ESA*. As previously noted, Pin Services never asked the delegate to recuse himself, nor did it pursue the matter further with the Director of Employment Standards. I further note that through this appeal, Pin Services has been afforded a fresh opportunity to argue that Ms. Kariuki was an independent contractor and, in my view, its argument on that score cannot be accepted (see *Barahmand*, BC EST # D050/13, reconsideration refused: BC EST # RD072/13).

33. To summarize, I am unable to conclude that the delegate made findings adverse to Pin Services because he was biased against that firm. Rather, the delegate – after reviewing the relevant legal considerations and the evidence provided by the parties – came to a conclusion generally (but not entirely) favouring Ms. Kariuki's position. In my view, the delegate's reasons regarding Ms. Kariuki's status are intelligible, detailed and cogent.

Errors of law

34. Pin Services says that the delegate committed several separate errors of law but, for the most part, its challenges constitute no more than a disagreement with the delegate's findings of fact. Pin Services says that the delegate erred in finding that wages were owing to Ms. Kariuki; that Ms. Kariuki was entitled to be reimbursed for certain business costs; and that she was entitled to compensation for length of service, vacation pay, and interest. Pin Services also contests the delegate's decision to levy administrative penalties. With respect to some of these alleged errors of law, Pin Services simply asserts that the delegate erred, but does not provide any further evidence or argument to support its assertion.

35. Pin Services' most fundamental objection, however, appears to concern the delegate's determination that Ms. Kariuki was an employee rather than an independent contractor. Accordingly, I will first address this issue.

36. An appeal of a determination about whether an individual is an employee or an independent contractor raises a question of mixed fact and law. These sorts of issues require the first-level decision-maker to apply a legal standard to a set of facts (see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 26). In general, an appellate body must not overturn a decision regarding a question of mixed fact and law unless the decision-maker made a "palpable and overriding error". However, if the decision maker erred regarding a discrete legal question, the appellate body may intervene on the basis of the "correctness" standard.

37. In my view, the delegate did not commit any discrete legal error. He considered the appropriate statutory test – involving, principally, the various definitions of "employee", "employer", and "work" set out in section 1 of the *ESA* – as well as other well-established common law considerations such as direction and control, integration, and economic dependence. As for the *relevant* facts with respect to the status issue, which are largely uncontested, they clearly point to an employment relationship. While certain facts could point to an independent contractor relationship (the "Associate Agreement" defined the relationship as such; Ms. Kariuki submitted invoices to Pin Services; she apparently had a GST account; she paid certain business expenses on her own account; and *may* have filed her tax return as a contractor), on balance, I am unable to find that the delegate was clearly wrong in determining that there was an employment relationship. The delegate's analysis on this matter is set out at pages R1 – R15 of his reasons, and I generally accept his analysis to be fundamentally correct.

38. At its core, the evidence shows that Ms. Kariuki was carrying out the sort of duties that many sales and marketing employees undertake for their employers, and that she was an integral part of Pin Services' business, rather than working on her own as an independent entrepreneur. At some future point in time, Ms. Kariuki might have struck out on her own and established an independent business valuation firm, but during her tenure with Pin Services, she was not operating any such independent business. During her one-year tenure, she simply worked for Pin Services as an employee.

39. I now turn, briefly, to the other errors of law that the delegate allegedly committed. Pin Services says that the delegate erred in finding any wages to be owing. This question is almost entirely a factual matter. The delegate's findings regarding the wages owed are set out at pages R13 – R19 of his reasons. I am not persuaded that any of his findings of fact was wholly unsupported by the evidence before him. Pin Services does not say how or why the delegate's findings of fact lack any evidentiary support.

40. Pin Services says that the delegate erred in finding that Ms. Kariuki paid certain business costs on her own account, but this argument appears to be predicated on its assertion that Ms. Kariuki was an independent contractor. However, as an employee, she was not obliged to pay on her own account for such things as postage, shipping, and office supplies.

41. Pin Services says that the delegate erred in awarding wages based on the compensation set out in the Associate Agreement rather than using the minimum wage (and then further erred by using the contract wage rate to calculate vacation pay and compensation for length of service). However, "wages" are defined in section 1 of the *ESA* as including "commissions…paid or payable by an employer to an employee for work". The Associate Agreement defined the compensation payable, and I fail to see how the delegate erred when he simply applied the wage rate the *parties* expressly agreed to. The minimum wage rate would only be relevant if the contractual wage rate fell below the minimum wage threshold (and that is not the situation here).

42. Finally, and with respect to Ms. Kariuki's entitlement to section 63 compensation for length of service, it must be acknowledged (as Pin Services asserts) that Ms. Kariuki did, in fact, submit a resignation (with two weeks' notice). However, the delegate determined that this resignation was precipitated by Ms. Kariuki's frustration about not being paid the wages to which she was entitled. At common law, such a circumstance could give rise to a "constructive dismissal".

43. Under section 66 of the *ESA*, if an employer substantially and adversely makes unilateral alterations to an employee's conditions of employment, that conduct may be treated as a termination of employment. Pin Services says that Ms. Kariuki resigned because she no longer wished to pay the $4,000 balance due for the "comfort level deposit". This assertion stands in stark contrast to the delegate's finding of fact that Ms. Kariuki resigned because she wasn't being paid the wages she had earned. This latter finding was amply supported by the evidence before the delegate. I see no reasonable basis for interfering with the delegate's finding regarding the application of section 66 in this case.

44. Finally, Pin Services says that the delegate erred in law by awarding interest and in levying administrative penalties. These assertions are not particularized; they are simply bald assertions. Interest is payable under section 88 of the *ESA* and is a mandatory obligation when wages are found to be owing. As for the monetary penalties, these were levied under section 98 on the basis of Pin Services' demonstrated contraventions of the *ESA*. I see no basis for concluding that the delegate erred in law either by awarding interest or in levying monetary penalties.

Summary

45. In my view, Pin Services' appeal, both with respect to its "natural justice" and "error of law" grounds, has no reasonable prospect of succeeding. That being the case, it must be dismissed under section 114(1)(f) of the *ESA*.

46. Ms. Kariuki's section 10 claim, dismissed as untimely, should be reconsidered in light of the B.C. Court of Appeal's decision in *Karbalaeiali*. With respect to this matter, the delegate is not obliged to adjudicate the section 10 claim on its merits, but he must consider whether, as an exercise of his statutory discretion, he will do so.

ORDERS

47. Pursuant to section 114(2) of the *ESA*, Ms. Kariuki's complaint, but only as it concerns section 10, is referred back to the Director for further investigation. Pursuant to section 114(1)(f) of the *ESA*, the appeal filed by Pin Services is dismissed.

48. In all other respects, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal