Employment Standards **TRIBUNAL**

Citation: Francesco Aquilini, Paolo Aquilini, Roberto Aquilini et al
and Certain Employees (Re)
2020 BCEST 90

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as the Golden Eagle Blueberry Farm
(the "Employer")

– and by–

Certain Employees
(the "employees")

- 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)

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2019/075, 2019/076,
2019/084 – 2019/134

DATE OF DECISION: July 24, 2020

DECISION

SUBMISSIONS

Nazeer T. Mitha	legal counsel for Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as the Golden Eagle Blueberry Farm
Raul Gatica	on behalf of Dignidad Migrante Society ("Dignidad") and certain employees (see Appendices A and B)
Ilmer Alexander Asencio Escobar	on his own behalf
Ingrid Violeta Baillas Coxaj	on her own behalf
Laurel Courtenay	legal counsel for the Director of Employment Standards

INTRODUCTION

1. On May 13, 2019, Sukh Kaila, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination in the total amount of $133,632.56 including interest, under section 79 of the *Employment Standards Act* (the "*ESA*"). This latter amount appears to be incorrect due to an arithmetic error – the actual amount of wages owing, including section 88 interest, is $133,737.87 (as recorded in the "Wage Calculation Summary", being Appendix B to the Determination). The sum of the 185 employees' unpaid wages ($126,569.00), vacation pay ($5,062.76), and section 88 interest ($2,106.11) is $133,737.87 not, as is recorded in the Determination, $133,632.56.

2. The delegate also issued his "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination. The Determination was issued following an investigation into complaints filed on behalf of several, but not all, of the respondent/appellant employees (collectively referred to as the "employees").

3. The Determination was issued against Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as the Golden Eagle Blueberry Farm (collectively referred to as the "Employer"). The Geri Partnership is a general partnership registered on April 2, 2003 with BC Registry Services and the nature of its business is described in that registration as "Agriculture – owns and operates farms". The partners in the Geri Partnership are Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, and Lewis and Harris Trust Management Ltd.

4. In addition to the wage payment order, the delegate levied a single $500 monetary penalty against the Employer for having contravened section 8 of the *ESA*. This latter provision prohibits various types of misrepresentations, including those regarding the "type of work", "the wages", and the "conditions of

employment" (this latter term is defined in section 1(1) of the *ESA* as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees"). Accordingly, the total amount recorded as being payable under the Determination is $134,237.87 (i.e., the corrected total amount of wages and interest, $133,737.87, plus $500).

5. One might reasonably assume, given the delegate's separate unpaid wage awards in favour of 185 employees, that the Employer made discrete misrepresentations to each individual employee and, on that basis, should have been subjected to 185 separate monetary penalties. However, section 29(1.1) of the *Employment Standards Regulation* (the "*Regulation*") states that "an act or omission of an employer constituting a contravention of a requirement under the Act is deemed to be a single contravention regardless of the number of employees affected by the contravention".

6. The delegate's investigation appears to have been triggered by two written complaints independently filed by the Dignidad Migrante Society ("Dignidad") on behalf of 12 identified employees, and the British Columbia Federation of Labour ("BC Fed") on behalf of 170 unidentified employees. I should note that the delegate's reasons incorrectly refer to the Dignidad complaint as having been filed by a separate organization, the "Migrant Workers Dignity Association". However, the record clearly shows that Dignidad filed one of the two complaints that triggered the delegate's investigation.

7. I will outline the background facts in greater detail, below. Very briefly, the employees entered Canada and worked for the Employer at its blueberry/cranberry farm in Pitt Meadows. The employees were employed under the provisions of the federal government's Temporary Foreign Worker Program ("TFWP"). I understand that most, if not all, of the 185 employees who were awarded wages under the Determination came to Canada from Guatemala under the auspices of the TFWP.

THE APPEALS

8. Two separate Appeal Forms were filed with the Tribunal, one by the Employer and another by Dignidad. These appeals involve numerous separate parties. A total of 53 appeals are before me – 1 filed by the Employer and the other filed by Dignidad on behalf of 52 employees. The respondents to the Employer's appeal, other than the Director of Employment Standards, are identified in Appendix A to these reasons. Dignidad represents 61 of these 63 employees and 2 employees are acting on their own (although neither one has actively participated in the Employer's appeal). The remaining 122 employees are not respondents to the Employer's appeal.

9. The Employer's appeal (Tribunal File No. 2019/075) is based on sections 112(1)(a) and (c) of the *ESA*. These two grounds of appeal are, respectively, that the delegate erred in law in issuing the Determination, and that new evidence is now available. Although the Employer only identified these two grounds of appeal on its Appeal Form, its written argument in support of its appeal also refers to various alleged breaches of natural justice by the delegate (section 112(1)(b) of the *ESA*).

10. The Employer, by way of remedy, requests that the Determination be cancelled. In the ordinary course of events, if a determination is cancelled, the wage payment obligation set out in it is extinguished. However, in this appeal the Employer's position regarding the wages determined to be owing is as follows:

> …the Employer will not be seeking repayment of the entire $133,632.56 of wages, vacation pay and interest which it has paid pursuant to the Determination. The Employer is seeking that:
>
> a. $11,449.94 which was paid on account of employees who fled and cannot be located be donated to Red Cross [*sic*] for the benefit of people in Guatemala;
>
> b. $7,734.40 which was paid on account of employees who fled, but remained situated in Canada, be donated to the Red Cross for the benefit of people in Guatemala; and
>
> c. the remaining balance of the $133,632.56 remain with employees to whom it has been paid.

11. According to the Director of Employment Standards (the "Director"), no monies have yet been paid to any of the employees. The funds payable under the Determination are currently being held in the Director's trust account:

> On May 17, 2019, the [Employer] sent a cheque in the amount of $116,465.55 to the Director. This amount represented the funds owing under the Determination minus statutory deductions. The cheque was deposited in the Director's trust account and the funds remain there accumulating interest.

12. The Director's position is that if the Employer succeeds in this appeal, its proposal regarding the distribution of funds is not one that the Director can implement, nor is it one that the Tribunal can lawfully direct under the *ESA*.

13. Dignidad originally filed an appeal on behalf of 51 of the 185 employees who were awarded unpaid wages under the Determination. Dignidad now represents 52 of the employees named in the Determination on whose behalves it has appealed (Tribunal File Nos. 2019/076 *et al.*) – these employees are identified in Appendix B to these reasons, and this group includes 9 of the 12 complainants identified in the original Dignidad complaint. Dignidad does not represent any of the remaining 133 employees with respect to the appeal that it filed, and none has appealed the Determination on his or her own behalf. For ease of reference, I shall refer to the appeal filed by Dignidad on behalf of the 52 employees it now represents as the "Dignidad appeal".

14. The Dignidad appeal is based on the grounds that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and on the ground that evidence has become available that was not available at the time the Determination was issued.

15. The Dignidad appeal was not filed within the statutory appeal period. Accordingly, Dignidad seeks an extension of the appeal period under section 109(1)(b) of the *ESA*. The Director of Employment Standards "takes no position" regarding the application to extend the appeal period. The Employer opposes Dignidad's extension application. I address Dignidad's application to extend the appeal period, below. However, before turning to that application, I will set out the relevant background facts.

FACTUAL BACKGROUND AND THE DELEGATE'S INVESTIGATION

16. The Employer operates a blueberry/cranberry farm in Pitt Meadows. Under the terms of the TFWP, employers may apply to Employment and Social Development Canada ("ESDC") to hire foreign workers on a temporary basis to fill positions supposedly not capable of being filled through the local labour market. After a Labour Market Impact Assessment ("LMIA") is issued, a worker named in the LMIA signs an employment contract (the federal government provides a form of contract that may be used for this purpose), and the worker then applies for a work permit. After the work permit is issued, the employer is responsible for arranging the worker's travel to Canada.

17. The section 112(5) record includes an ESDC LMIA, in the form of a letter dated February 12, 2018, authorizing "Geri Partnership" and "Golden Eagle Farms" to hire 10 "general farm workers" for a period of 8 months at an hourly rate of $11.35 plus 4% vacation pay. The "hours of work" set out in the LMIA was fixed at "40.00 hour(s) per week". The LMIA (No. 8285862) also authorized the Employer to deduct $30 per week from the workers' wages for "on-farm" housing. The record also includes an undated list of "Foreign Worker Names" (LMIA No. 8300664) which includes many of the individuals identified in Appendix A ("Names of Complainants") appended to the Determination.

18. As set out in the delegate's reasons (page R7), on September 16, 2018, Dignidad filed a confidential complaint on behalf of 12 employees who formally authorized Dignidad to act on their behalf. Although the Dignidad complaint refers to "around 150 female Temporary Foreign Farm Workers" who were hired by the Employer, the Dignidad complaint only included the names and signatures of 12 individuals. Nevertheless, the Dignidad complaint refers, in various sections, to more than 12 employees. For example, the complaint identified "nineteen women [who] have experienced health-related issues", and referred to the on-site housing situation of 146 women.

19. On September 19, 2018, the British Columbia Federation of Labour (the "BC Fed") filed, by electronic mail, a relatively cursory complaint on behalf of 170 unidentified employees.

20. In general terms, the Dignidad complaint (set out in a September 16, 2018 letter to the Director of Employment Standards and to the provincial Minister of Labour) alleged various contraventions of the *ESA* as well as other matters that clearly fall outside the Director's jurisdiction such as occupational health and safety complaints that are within the bailiwick of WorkSafeBC. The complaint also referred to substandard housing, managers' abuse and mistreatment of the employees, and the *de facto* "imprisonment" of the employees. Of more direct relevance to the *ESA*, the complaint alleged that many of the employees had not been provided with 40 hours of paid work each week contrary to their employment contracts, were paid "piecework" rates rather than the hourly wage fixed by their employment contracts, were entitled to work for not less than 6 months, had medical insurance premiums and income tax remittances wrongfully deducted from their wages, had been subjected to unlawful Employer retaliation, and had been required to pay "hiring fees" in Guatemala (of between $2,000 and $3,000 CAD) "to obtain employment with GERI Partnership/Golden Eagle group".

21. The 1-page (excluding attachments) BC Fed complaint dealt strictly with wage-related matters and the relevant portions read as follows:

> As per the attached contract, the workers were to receive 40 hours pay per week, work which stopped for 120 workers two weeks ago, and for the other 50 one week ago.
>
> As per the contract, the workers should receive no less than 80 hours pay every two weeks.
>
> The workers are also owed overtime for hours in excess of 40 per week for the period from when they arrived in June to two weeks ago and one week ago respectively.

22. By letter to the Tribunal dated June 28, 2019, the delegate provided the following particulars regarding his investigation and the individual employees involved:

> During the investigation and at the time of the issuance of the Determination dated May 13, 2019, Dignidad represented the following 12 employees only. These 12 employees were treated as confidential Complainants during the investigation [chart omitted] ...
>
> With the Determination, Dignidad received only the names and wage awards for the 12 employees it represented at the time. Following the issuance of the Determination, Dignidad informed the Employment Standards Branch that it was representing an additional 41 employees and provided authorizations from those employees. The BCFED filed a third-party complaint on September 19, 2018, however the BCFED does not represent any of the [185] individual employees named in Appendix A ["Names of Complainants"] of the Determination. For this reason, The BCFED did not receive Appendix A of the Determination. [*sic*]

23. With respect to the 12 individual employees' original unpaid overtime pay claims, it should be noted that "farm workers", defined in section 1(1) of the *Regulation*, are excluded from the *ESA*'s overtime pay and statutory holiday pay provisions (see section 34.1 of the *Regulation*). Of course, to the extent that "farm workers" work more than 40 hours in a week, they are still entitled to be paid for those additional working hours at their regular wage rate.

24. The record includes a 4-page agreement between "GERI Partnership DBA Golden Eagle Farms" and one of the complainants listed in Appendix A to the Determination. The contract, which appears to be dated May 15, 2018 (the date on the copy of the agreement in the record is not entirely legible) is for a 6-month term and is conditional on a TFWP work permit being issued. The work to be undertaken by the worker is described as "[p]lanting, pruning, fertilizing, weeding, cleaning, harvest preparation and harvesting". The document appears to be a standard form document with places for certain information to be either typed or handwritten onto the document in the appropriate blank space. I have reproduced some of the key provisions of this "Employment Contract", below, and any added typed or handwritten text has been underlined:

> **1. Duration of Contract**
> 1.1 This contract shall have a duration of 6 months from the date the temporary foreign worker assumes his/her functions.
>
> **3. Work Schedule**
> 3.1 The temporary foreign worker shall work 40 hours per week and shall receive [blank]% more than the regular wages for the hours worked over this limit, where provincial law permits. His/her workday shall begin at [blank] and end at [blank] or, if the schedule varies by day, specify:
> rotational shifts, may require varied start and end times

3.2 The temporary foreign worker shall be entitled to 30 minutes of break time per day (lunch, coffee breaks, etc.).

3.3 The temporary foreign worker shall be entitled to 1 day(s) off per week, on varies

3.4 The temporary farm worker shall be entitled to [blank] weeks or [blank] days of paid vacation, where provincial law permits.

4. Wages and Deductions
4.1 The employer agrees to pay the temporary foreign worker, for his/her work, a wage of $ 11.35 per hour or per piece rate (applicable in British Columbia only as set out in the "Minimum Wage Rates – Hand harvested crops" published in the British Columbia Ministry of Skills Development and Labour for harvesting). These shall be paid at intervals of biweekly

4.3 The employer shall not recoup from the temporary foreign worker, through payroll deductions or any other means, any costs incurred in recruiting or retaining the temporary foreign worker. This includes, but is not limited to, any amount payable to a third-party representative/recruiter.

25. On September 21, 2018, the Employment Standards Branch's acting regional manager for the Langley office sent a letter to the Employer enclosing the Dignidad and BC Fed complaints. The letter advised that an investigation into the complaints was then underway, and indicated what further documentation the Branch required as part of the investigation. On October 26, 2018, and in response to a Demand for Employer Records (see section 85), the employer delivered various payroll documents to the Branch. The delegate's reasons, at pages R7 – R8, outline what transpired thereafter:

> The records consisted of a generic copy of the employment contract signed and dated on February 19, 2018 used to hire Guatemalan employees, Labour Market Impact Assessments ("LMIA") and payroll records. The LMIA's [*sic*] provide information regarding the number of employees Geri Partnership is able to bring from Guatemala as well as their duration of stay.
>
> The records were reviewed and on January 11, 2019, Geri Partnership was requested to do a self-audit and calculate the amounts owing to individuals who were not given the opportunity to work the number of hours per week stipulated in their individual employment contracts. On February 1, 2019, the Employer forwarded the results of the self-audit to the Branch. I sent a preliminary findings letter to Geri Partnership on February 15, 2019. I advised Geri Partnership that on the facts before me, it appeared it had contravened Section 8 of the Act, and I provided it an opportunity to provide evidence and submissions in that regard. On March 1, 2019, the Employer provided a response that included a written submission, a number of authorities and a statutory declaration from Holly Bedford, Paralegal with the law firm Harris and Company LLP, sworn on March 1, 2019 ("Bedford Declaration").

26. The delegate's January 11, 2019 letter apparently followed a November 28, 2018 meeting between the delegate and representatives of the Employer. The Employer responded to the January 11th letter by an e-mail dated February 1, 2019, stating "we have compiled information on the gap between what the workers were paid and hypothetically if they were guaranteed 40 hours minimum pay". However, the Employer also stressed in its February 1st communication that "we strongly disagree that the 40 hours is guaranteed in the contract".

27. The delegate, by letter dated February 15, 2019, acknowledged receipt of the Employer's records and argument, and set out what the delegate stated were his "preliminary findings". In essence, the delegate concluded, on a preliminary basis, first, that the Employer contravened section 8 of the *ESA* by offering the employees 40 hours of paid work each week, but then failing to honour that commitment. Second, relying on the Employer's payroll records and its "self-audit" of those records, the delegate found that the employees were owed a total of $126,569 plus 4% vacation pay. Third, the delegate noted that administrative penalties are mandatory for contraventions of the *ESA*, or of any accompanying regulatory provision, and that "[a] separate penalty for each contravention is applied". Fourth, the delegate noted that the Employer's corporate directors and officers could also be held personally liable for unpaid wages under section 96 of the *ESA*. The delegate directed the Employer to provide its response to the preliminary findings by no later than February 26, 2019 (this deadline was subsequently extended to March 1, 2019). The delegate's February 15th letter concluded with this caution: "This is your opportunity to provide submissions and evidence regarding the above preliminary findings…In the absence of a response, I will issue my determination based on the available evidence and forward to our collections department immediately".

28. Although the delegate required the Employer to provide payroll records and to file a written submission regarding its position, the delegate did not give the complainants (or their agents, Dignidad and the BC Fed) an opportunity to review those records, and to make submissions regarding the accuracy of the Employer's records and its unpaid wage calculations.

29. As noted above, the Dignidad complaint specifically raised several claims that the delegate neither investigated nor adjudicated. The BC Fed complaint specifically referred to unpaid "overtime" pay, and even though "farm workers" are not entitled to be paid overtime at the premium rates set out in section 40 of the *ESA*, they are nevertheless entitled to be paid at their regular wage rate for all hours worked (see, for example, *Kamloops Golf & Country Club v. B.C. (Director of Employment Standards)*, 2002 BCSC 1324).

30. I am not suggesting that all, or any, of the employees' claims separate from those relating to the "40 hours per week work guarantee", were meritorious. However, by seemingly restricting the investigation to whether there was a weekly wage guarantee, and by limiting the investigative process to communications to and from the Employer, the delegate appeared to have summarily dismissed the other elements of the employees' complaints without hearing from either the employees or their representatives. I note that the delegate's reasons do address Dignidad's claims that the employees had been guaranteed 6 months' work, were entitled to be reimbursed for "hiring fees" (see section 10), and the allegations regarding substandard housing and intolerable working conditions (rejecting all of these claims). However, these latter claims were not identified in the delegate's February 15, 2019 "preliminary findings" letter, and the delegate seemingly never invited Dignidad to provide further particulars regarding these claims prior to issuing the Determination.

31. Returning to the factual narrative, on March 1, 2019, the Employer's legal counsel submitted a response to the delegate's preliminary findings. The Employer maintained that it had not contravened section 8, and further submitted that the delegate's preliminary findings "has no evidentiary basis, constitutes a breach of natural justice and raises a reasonable apprehension of bias on the part of the Director".

32. The Employer also advanced the following arguments in its March 1st submission:

- "Section 8 is a 'pre-hiring provision' and its protection only covers pre-hiring practices";
- "…there is no evidence relating to whether the statement regarding 40 hours of work was false or misleading at the time the Complainants reviewed the contracts" or "what actual representations were made to each of the Workers by the Employer during the pre-hiring timeframe and, in particular, when or if there was discussion regarding the amount of hours per week" or "whether the workers relied on the representations";
- "Once a contract of employment is signed, Section 8 no longer applies. It may be that failing to provide 40 hours a week is a breach of contract; however, it is not a misrepresentation pursuant to Section 8 of the Act"';
- "The provision in the contract regarding hours of work does not provide a guarantee of 40 hours per week, and therefore, cannot be considered a representation pursuant to Section 8 of the Act";
- "A plain reading of Clause 3.1 [Note: reproduced above] indicates that the obligation is on the Workers to provide 40 hours of work per week as a 'limit' before additional pay is provided". Clause 3.1 and 4.1 [Note: reproduced above] does [*sic*] not place any obligation on the Employer except to pay $11.35 per hour for each hour worked, and to provide additional pay when Workers exceed working over 40 hours per week. Given the context, Clause 3.1 must be read to mean the Workers will be paid additional wages if they work over 40 hours per week, not that 40 hours per week will be guaranteed by the Employer. Such an obligation is wholly removed from the language of the Contracts"; and
- If the Employer intended to guarantee 40 hours of work each week, the wage rate would have been expressed as a weekly salary rather than an hourly wage and "that in order to establish a guarantee in a contract, there must be explicit wording to that effect (*Singh v. BC Hydro,* 2001 BCCA 695)" and "[n]either clause 3.1 or 4.1 provide explicit wording so as to create a guarantee of hours".

33. With respect to the matter of natural justice, the Employer submitted that the delegate's preliminary findings constituted a pre-judgment of the ultimate issue, thereby creating a reasonable apprehension of bias. The Employer also asserted that it had "been deprived of a fair opportunity to respond to the Complaints". The Employer's March 1st submission continued:

- "… the Director has…pre-determined the ultimate issue without hearing oral evidence from the Complainants' or Employer's witnesses and fail[ed] to provide the parties with an opportunity to cross examine said witnesses on their evidence";
- "[the delegate] failed to allow the Employer to know the names or identities of the Workers involved in the Complaints or the particulars of each Worker's case…"; and
- The delegate improperly placed "a reverse-onus on the Employer to demonstrate that it has *not* made a misrepresentation" (*italics* in original text) and that the overall "tone, tenor and content of the Director's [preliminary findings letter] is indicative of a pre-determination". In particular, the Employer referred to the delegate's statement that if the Employer did not

respond to the preliminary findings letter within the time-frame indicated, "I will issue my determination based on the available evidence and forward to our collections department immediately". The Employer, relying on *Truckair v. Canada (Attorney General)*, 2011 NSSC 398, submitted that the delegate should recuse himself from any further consideration of the matters raised by the employees' complaints.

34. There is nothing in the record to indicate that the Employer's March 1st response to the delegate's February 15th preliminary findings letter was ever provided to the affected employees, or to either of their representatives, for their review and reply. It would appear that the very next step in this matter was the issuance of the Determination (and the delegate's accompanying reasons) on May 13, 2019.

THE DETERMINATION

35. The central issue, as framed by the delegate in his reasons, was whether the temporary farm workers employed at the Golden Eagle Blueberry Farm were, in fact, promised 40 hours of work each week. The delegate also considered whether some employees had been promised 6 months' work, but were not employed for that length of time. Finally, the delegate addressed the complainants' assertions regarding certain payments (allegedly ranging from $2,000 to $3,000) that had apparently been made to an individual in Guatemala in order to secure employment with the Employer. The delegate dismissed these latter two claims (see delegate's reasons, pages R12 – R13).

36. The delegate's February 15, 2019 preliminary findings letter did not make any findings, or even refer to, whether some of the employees had been promised 6 months' work; whether the Employer had made unlawful wage deductions for medical insurance premiums and income tax; the alleged retaliatory behaviour by the Employer; or the payments allegedly made in Guatemala to secure employment with the Employer. Nevertheless, in his reasons, the delegate held against the employees regarding two of these latter matters:

- The delegate referred to clauses 1.1 [reproduced above], 5.3 (temporary worker hired by a new employer; employer's return transportation cost obligations), 9.1 (minimum 1 week notice of resignation by worker) and 10.1 (notice of termination by Employer) of the employment contracts and then stated: "I find there is no plain interpretation that would suggest that the Employer misrepresented the duration of the contract. Accordingly, I am not persuaded by [Dignidad] or the [BC Fed's] argument that the [employees] are entitled to six months [*sic*] wages. I find that [the Employer] did not contravene section 8 of the Act by misrepresenting the duration of the contract to the [employees]." (delegate's reasons, page R12).
- "While section 10 of the Act does not allow such payments to be collected by employers or other persons in exchange for employment, there is no evidence; only [Dignidad's] allegation that someone named Henry in Guatemala charged fees to the [employees]. This is not a sufficient basis for me to make any finding on whether there has been a contravention of s. 10. Moreover, given that the alleged payments occurred in a different jurisdiction and have no evidentiary connection to [the Employer], I find there is insufficient evidence to support a finding of a contravention of section 10." (delegate's reasons, pages R12-R13).

37. As previously noted, the delegate's reasons do not address the Dignidad complaint insofar as the deduction of medical insurance premiums, payroll deductions/remittances on account of income tax, or retaliation are concerned, or the BC Fed complaint as it concerned employees who worked *more* than 40 hours in a week. The delegate's reasons acknowledge that some of these matters were raised in the original complaints (see page R8), but the delegate did not undertake any fuller investigation of them. The delegate, correctly in my view, determined that the complainants' concerns about sub-standard housing and generally poor working conditions were not matters he had jurisdiction to address under the *ESA*.

38. The delegate determined that the Employer represented, through its standard form of contract, that the employees would be provided with 40 hours of work each week. The delegate held that the plain meaning of clause 3.1, especially since it stated the employees "*shall* work 40 hours per week", was that the Employer guaranteed 40 hours of paid employment each week. Further, the delegate held (at pages R16-R17) that:

> …given the inequality of bargaining power between an employer and a temporary foreign worker who has left their homeland and family to work abroad in British Columbia, I find that any ambiguity in the terms of the contract should be interpreted against the interests of the Employer, who as noted above, is responsible for preparing the contract of employment under the Federal Government TFW Agricultural Stream program. This accords with the long established principle that when two contracting parties disagree on a contractual provision, the preferred meaning should be the one that works against the interests of the party who provided the wording. I would further note that this interpretation also accords with the principles of contract interpretation (admittedly in the different context of termination provisions) outlined by the BC Court of Appeal in *Miller v. Convergys CMG Canada Limited*, 2014 BCCA 331. In that case, the BCCA noted that employment contracts should be interpreted in a way that prefers employment law principles; specifically the protection of vulnerable employees in their dealings with their employers. Given the facts in the present case, which involves vulnerable temporary foreign workers, I find this direction on contract interpretation from the BCCA particularly relevant.

39. The delegate rejected the Employer's natural justice argument, holding that his February 15, 2019 preliminary findings letter did not constitute a pre-judgment of the issues in dispute, and that there was no "clear and convincing evidence" that the process he followed during his investigation was, or even appeared to be, biased against the Employer.

40. Having found that the Employer contravened section 8, the delegate issued a wage payment order under 79(2)(c) of the *ESA* based on each complainant receiving 40 hours of paid work for each week they had worked for the Employer during the statutory wage recovery period. This wage payment order was based on the Employer's self-audit which delegate said he "reviewed and cross-referenced…with the payroll records provided by the Employer as a result of the Demand for Employer Records and find them to be reliable" (page R18).

41. The Employer's total liability under the Determination was fixed at $126,569.00 on account of unpaid regular wages, $5,062.76 representing 4% vacation pay, and a further $2,106.11 for section 88 interest. Accordingly, the total amount payable under the Determination is $133,737.87 (as noted above, there is

an arithmetic error in the Determination showing the total amount of wages and interest payable to be $133,632.56).

THE TIMELINESS OF THE DIGNIDAD APPEAL: SECTION 109(1)(b)

42. The deadline for filing an appeal of the Determination, presumably calculated in accordance with sections 112(3) and 122 of the *ESA*, was June 20, 2019. This deadline was set out in a text box headed "Appeal Information" found at the bottom of the third page of the 5-page Determination. Dignidad filed its Appeal Form on June 24, 2019. Accordingly, Dignidad seeks an extension of the appeal period pursuant to section 109(1)(b): "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired".

43. The Director "takes no position" regarding the application to extend the appeal period. The Employer opposes the extension application.

44. On June 20, 2019 (the appeal deadline set out in the Determination), Dignidad submitted a 1-page letter to the Tribunal stating that it represented "51 Temporary Foreign Farm Workers from Guatemala…against **<u>Golden Eagle Blueberry Farm</u>**" (**<u>emphasis</u>** in original text) and requesting "an extension of time for the statutory reconsideration period [*sic*] pursuant to section 109(1)(b) of the Employment Standards Act". This document was received after the Tribunal's office had closed for the day and, accordingly, it was date stamped June 21, 2019 in accordance with the Tribunal's *Rules of Practice and Procedure*.

45. Dignidad requested an extension of the appeal period to July 4, 2019 so that it could obtain further information from the employees. In particular, Dignidad asserted that:

- "90% of the workers we represent are in Guatemala right now and it has been very difficult to consult with them respecting their decision to appeal…"; and
- "Many of the workers in Guatemala have been just getting the information about the [Determination] and the wages they are owed, and they are in the process of revising [*sic*; reviewing?] their documents in order to ensure that their records are consistent with what the employer advised the Employment Standards Branch as owing".

46. More generally, in its June 20th letter, Dignidad maintained that the Employer's records appeared to be inaccurate. That being the case, and since the Determination was based on a "self-audit" conducted by the Employer, the Determination did not reflect the Employer's actual unpaid wage liability to the employees.

47. On the following Monday, June 24, 2019, Dignidad filed an Appeal Form (a 2-page document posted on the Tribunal's website), but did not file any other supporting documents. Dignidad indicated on the form that it was invoking all three available statutory grounds of appeal and that it wished to have the Determination "varied". Although the form directs an appellant to "provide your reasons and argument for your appeal on a separate piece of paper", no supporting written reasons for appeal were attached.

48. By letter dated June 26, 2019, the Tribunal's Registrar informed Dignidad that the appeal was incomplete – among other things, the Determination was not attached; Dignidad did not indicate who, among the 185 employees named in the Determination, it was representing (Dignidad's June 20th letter merely stated it represented 51 employees); and it did not submit any written authorizations to act as required by the Tribunal's *Rules of Practice and Procedure*. Dignidad was directed to submit various information – in order to perfect its appeal – by no later than July 4, 2019. On July 4, 2019, Dignidad submitted almost all of the information requested, but not all of the requisite employee authorizations. These latter authorizations were later submitted, and the appeals were perfected on July 12, 2019. Of the 52 appellant employees, 9 were named in the original Dignidad complaint.

49. As noted above, the Determination was issued following an investigation that was initiated as a result of separate complaints filed by Dignidad (on behalf of 12 named employees) and the BC Fed (on behalf of 170 unidentified employees). The Determination was served on the various parties who constitute the "Employer", and in addition, copies of the Determination were delivered to both Dignidad and the BC Fed.

50. Section 81(1) of the *ESA* provides as follows: "On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following…". Section 122(1) states that a determination may be served personally or by registered mail to the person's last known address. If served by registered mail, section 122(2) provides that the determination is deemed to have been served "8 days after the determination…is deposited in a Canada Post Office". Notwithstanding these provisions, the Determination was not served on any of the 185 employees who were awarded wages under it.

51. Section 112(1) of the *ESA* states that "a person served with a determination may appeal the determination to the tribunal". Section 112(3) states that an appeal must be filed within either 21 or 30 days, depending on the mode of service (i.e., personally or by registered mail), "after the date of service". It could perhaps be argued that the Determination was "served" on the 12 employees listed in the original Dignidad complaint by serving their representative, Dignidad. However, as noted above, none of the employees was ever served, either personally or by registered mail.

52. The Director says the Determination was provided to Dignidad as the representative for 12 employees, and to the BC Fed "listing the global wage amount but not the names of the individual employees or their wage amounts". It appears that the BC Fed never had specific authority from any of the 170 employees it purported to represent when its complaint was filed. The Director has consistently referred to the BC Fed complaint as a "third party" complaint. Thus, it appears that of the 185 employees who were awarded wages under the Determination, at best, only 12 were "served" with it, if one accepts that Dignidad was their agent for purposes of service.

53. There appears to a "gap" in the relevant legislative provisions governing service of a determination, and who may appeal a determination to the Tribunal. The *ESA* does not expressly provide for service on an agent and, read literally, a person does not have the right to appeal a determination unless and until it has been served on them. The section 112(3) appeal periods do not begin to run until "after the date of service of the determination". In my view, it is at least arguable that the 21- or 30-day appeal period has

never commenced running against any of the 12 employees represented by Dignidad, or indeed, on any of the 185 employees who were awarded wages under the Determination, since they were never served.

54. In any event, as noted above, the Director takes no position regarding Dignidad's application, on behalf of the 52 employees it represents, to extend the appeal period. The Employer opposes extending the appeal period because:

- Dignidad's statement that it was unable to file a timely appeal due to the fact that 90% of the employees were in Guatemala is a statement that is unsupported by any evidence to show "how the geographic location of some of the workers has impacted communication of the ability to file an appeal within the statutory time limits."
- at least some of the employees have been able to file timely human rights complaints and appear to have been in contact with Dignidad.
- alternatively, the Employer agrees with the Director's submission that "43 TFW's have no standing to appeal the Determination".

55. The Director's submission regarding the 43 employees' standing to appeal the Determination was not made in the context of this application to extend the appeal period. As previously noted, the Director takes no position regarding this application. Dignidad appeals the Determination on behalf of 9 employees who were identified in its original complaint as well as on behalf of 43 other employees who were awarded wages under the Determination. The Director submits that Dignidad "is not entitled to maintain an appeal [on behalf of the latter group of 43 employees] because they were not named in the Determination and they were not served with a copy of the Determination". The Director further notes, with respect to this group, that none of them has ever applied "for standing as a party to the appeal". This argument, in my view, stands separate and apart from this application to extend the appeal period.

56. The leading authority regarding section 109(1)(b) is *Niemisto*, BC EST # D099/96, where several non-exhaustive criteria were identified as being relevant to an application to extend the appeal period including whether: i) there is a reasonable and credible explanation for failing to file a timely appeal; ii) the appellant has had a *bona fide* ongoing intention to appeal that was communicated to both the Director and the respondent party/ies; iii) a respondent party would be unduly prejudiced if the appeal period were extended; and iv) the appeal has presumptive merit.

57. The delay involved in this appeal is not particularly lengthy – Dignidad first contacted the Tribunal on the last day of the appeal period as recorded in the Determination, June 20, 2019. The Appeal Form was filed the following Monday, June 24, 2019. Certainly, the appeal as filed was deficient, but it appears that Dignidad diligently endeavoured to perfect the appeal (which it did on July 12, 2019, about 3 weeks after the June 20, 2019 deadline set out in the Determination).

58. Although I accept the Employer's contention that the mere fact a party is outside Canada is not, of itself, a justification for ignoring the statutory appeal period, I think it reasonable to assume that communicating with a large number of former employees who reside in a developing country, coupled with the additional complications of language and the employees' relative unsophistication (in terms of the Canadian legal system), no doubt played a role in the failure to file a timely appeal.

59. I do not consider this appeal to be frivolous; indeed, the Director frankly concedes that with respect to the 12 employees named in the original Dignidad complaint (9 of whom are represented by Dignidad), the delegate failed to observe the principles of natural justice in making the Determination. I fail to see how the Employer would be prejudiced by a comparatively short extension of the appeal period, and the Employer does not assert that it would suffer prejudice if the appeal period were extended.

60. The funds payable under the Determination, less statutory deductions, have been on deposit with the Director in an interest-bearing account since May 17, 2019. In its separate appeal, the Employer has indicated that even if its appeal succeeds, it does not wish to have these funds returned. Rather, the Employer seeks an order directing that about $19,200 be distributed to the Red Cross (if certain individual employees cannot be located) and "the remaining balance of the $133,632.56 remain with employees to whom it has been paid." Accordingly, there is no extant financial exigency affecting the Employer.

61. In my view, after assessing the *Niemisto* factors, as well as accounting for some other considerations I identified, above, I am satisfied that an order extending the appeal period is appropriate in this case. Pursuant to section 109(1)(b) of the *ESA*, the appeal period is extended to July 12, 2019 (the date when Dignidad perfected its appeal).

62. I will now turn to the substantive arguments underlying the appeals filed by Dignidad and the Employer, commencing with the latter's appeal.

THE EMPLOYER'S APPEAL

63. As noted above, the Employer asserts that the delegate erred in law and that it has new evidence that was unavailable when the Determination was being made (sections 112(1)(a) and (c) of the *ESA*). Although the Employer's Appeal Form, prepared by its legal counsel, did not indicate that the Employer was relying on the "natural justice" ground of appeal (section 112(1)(b) of the *ESA*), in its written submission dated June 20, 2019 and appended to the Appeal Form, the Employer specifically argues that it "was deprived of Natural Justice and/or procedural fairness." The Employer asks that the Determination be cancelled.

64. The Employer says that the delegate erred in law by, first, interpreting clause 3.1 as a representation to the employees that they would be provided with 40 hours of paid work each week and, second, "by finding that the contents of Clause 3.1 were untrue statements at the time the Contract was signed."

65. The "natural justice" ground of appeal flows, in large part, from the Employer's assertion that it did not have sufficient information in hand to properly respond to the complaints prior to the Determination being issued. The Employer says:

> …at no time prior to the Determination was the Employer aware of the number of Complaints or the names of the Complainants. Further, the self-audit was provided at the requirement of the Delegate but without any analysis or reasons for the hours worked as these were not requested or sought by the Delegate and the Employer was unaware of the specifics of the Complaints.

66. The Employer says that it was required to "respond to bare assertions/allegations" and was not provided with sufficient particulars, or the evidence against it, and thus "was left guessing at what the claims against

it consisted of and could not properly respond." The Employer asserts that the breach of natural justice was "egregious" because "the Delegate had all of the information in its possession but failed to provide it to the Employer, failed to properly analyze it, and proceeded to issue a penalty against the Employer." Finally, the Employer maintains that if it had been given specific particulars regarding the complaints and the identities of the employees involved, it would have been able to submit "evidence about the context in which people worked 40 hours per week and an average of 40 hours per week".

67. The "new evidence" ground of appeal largely flows from the Employer's assertions in relation to its "natural justice" arguments. In essence, the Employer claims that since it was unaware of the identity of the employees (due to the confidential nature of the complaints), it "was thus unable to provide any evidence specific to any Complainant". The Employer notes that employees' identities have now been disclosed in the Determination – in Appendices A (listing the employees by name) and B (setting out each employee's individual wage entitlement) – and this has "brought to light additional evidence which is pertinent to this Appeal."

68. In particular, the Employer asserts that during the 2018 harvesting season, 47 of the employees awarded wages under the Determination failed to report to work – of this group, the Employer says that 35 (who were awarded a total of $11,449.94) are no longer living in Canada, while 12 (who were awarded $7,734.40) remain in Canada. The Employer says all of these employees "fundamentally breached" their employment contracts, and thus "should not be entitled to any monies pursuant to the Determination."

SUBMISSIONS BY DIGNIDAD AND THE DIRECTOR OF EMPLOYMENT STANDARDS IN RESPONSE TO THE EMPLOYER'S APPEAL

69. Dignidad and the Director of Employment Standards both filed submissions with respect to the Employer's appeal. Although two of the employees named in the Determination advised the Tribunal that they wished to act on their own behalf, neither employee filed any submissions in response to the Employer's appeal.

70. The Director says that this appeal should be dismissed, whereas Dignidad's submission largely, but not exclusively, addresses its own appeal, rather than that filed by the Employer.

Dignidad's Position

71. Essentially, Dignidad's position is that while the delegate correctly held that the Employer contravened the *ESA*, it maintains that the unpaid wage order issued does not reflect the proper amount of unpaid wages owed to the employees.

72. Dignidad says that the delegate erred in issuing only a single $500 monetary penalty, arguing that "it was not just one breach but at least 185 violations, because the company made misrepresentations to each worker, so the company must be charged for all of them". As noted above, section 29(1.1) of the *Regulation* is a complete answer to this submission.

73. Dignidad's submission details many alleged instances of bullying and sexual harassment. These allegations are not properly before the Tribunal, but could form the basis of a human rights complaint to the B.C. Human Rights Tribunal (see sections 86.2 and 103(g) of the *ESA*). Similarly, other claims set out in Dignidad's submission regarding workplace safety more properly fall within the purview of WorkSafeBC. Many of Dignidad's arguments relate to its separate appeal of the Determination and, as such, are not responsive to the Employer's appeal.

74. With respect to the critical clause 3.1 in the employment contracts, Dignidad says that there was no need to include any number of required work hours each week because, absent the 40 hour per week requirement, the employees would simply be paid for each hour worked at the agreed wage rate. However, by setting out a "shall work 40 hours per week" requirement, the parties clearly intended that the employees would commit to working 40 hours each week and the Employer, in turn, committed to providing the employee with 40 hours of work each week. Dignidad says that the 40-hour obligation reflected a balance between what the Employer required from the employees in terms of a weekly minimum labour commitment, and what the employees required from the Employer in terms of a minimum weekly compensation commitment.

The Director's Position

75. The Director says that the delegate correctly interpreted clause 3.1 of the employment contracts as guaranteeing the employees at least 40 hours of paid employment each week. The Director asserts that this clause is clear and unambiguous but, alternatively, says "that if there is any ambiguity it must be resolved *contra proferentum*" [*sic*; *proferentem*] in favour of the employees.

76. The Director rejects the Employer's assertion that clause 3.1 leaves the employees with no guaranteed hours per week whatsoever, and says that if this were the intent, the agreement could have expressly so provided. The Director asserts: "The reason the [Employer] did not do this is obvious: it is unlikely that any foreign worker would agree to uproot themselves to come to a foreign country where they are not guaranteed any hours of work." The Director maintains that the employees' identities and other personal information had to be kept confidential due to the "precarious nature of the relationship" between the Employer and the employees.

77. With respect to the alleged breaches of natural justice, the Director, while acknowledging that section 77 of the *ESA* obliged the delegate to afford the Employer a reasonable opportunity to respond to the employees' complaints, maintains that the delegate's process followed in this investigation fully complied with section 77. As for the Employer's "new evidence", the Director says that it is not admissible under the *Davies et al.* framework (see BC EST # D171/03).

78. Finally, the Director maintains that the Employer's appeal should be dismissed, but that the Employer's proposal regarding the distribution of the funds now held in the Director's trust account cannot be lawfully implemented. The Director says that if the Determination were quashed, the Director would not have any statutory authority to disburse the funds to any person other than the Employer.

The Employer's Reply

79. By way of reply to the Director's position that the employees' identities and other personal information had to be kept confidential due to the "precarious nature of the relationship" between the employees and the Employer, the Employer says that Director's submission is "surprising and is illustrative of the unfairness the Employer has faced from the outset in knowing and responding to the allegations". In particular, the Employer says that there was no need to treat the complaints as confidential under section 75 of the *ESA* because: i) the employees never requested in writing that their complaints be kept confidential; ii) there was no evidence that the employees were in a precarious relationship (and the delegate never requested submissions from the Employer regarding this matter); iii) even if there was a need for confidentiality at the outset of the delegate's investigation, there was no continuing need after November 2018, by which time "the last of the foreign workers from Guatemala [had] finished working at the farm"; iv) since the *ESA* prohibits retaliatory action (see section 83), and in the absence of any allegation of such behaviour, there was no need for employee confidentiality [Note: this is factually inaccurate; the Dignidad complaint did mention retaliatory behaviour]; and v) withholding individual employees' names and other information prevented the Employer from being able to adequately respond to the section 8 allegations because it was unable to assess each employee's particular individual circumstances such as "what was said to him/her, when was the contract signed, what were the terms of the contract, what hours did he/she work, were there any reasons why he/she did not work on any particular day or week, did he/she abandon employment, etc.".

80. Other assertions made in the Employer's January 27, 2020, "reply" are not proper responses to the submissions filed by either Dignidad or the Director. Rather, these arguments simply reiterate the Employer's principal position on appeal. Further, by way of "reply", the Employer has endeavoured to introduce new evidence (such as an assertion regarding the work circumstances of 27 other employees in an entirely separate complaint).

81. However, the Employer's January 27th reply submission does challenge several assertions made by the Director:

- The Director submitted that the employment contracts could have expressly provided that there was no minimum guarantee of any paid hours of work each week, but did not do so because "it is unlikely that any foreign worker would agree to uproot themselves to come to a foreign country where they are not guaranteed any hours of work". The Employer says that this statement is "speculation [and] contrary to the evidence…and…completely inappropriate".
- The Employer says the Director has misstated and misapplied the *contra proferentem* rule. The Employer says that the Director improperly relied on this rule to find that there was, in fact, a section 8 misrepresentation. The Employer says that the Director has no jurisdiction over questions of "pure contract interpretation" (these questions are solely for the courts) and that: "In effect, the Director gets through the back door, what is impermissible through the front door…the Director argues that because there are two possible interpretations of a contract, the one which would be contrary to the Employer's interests should be adopted". The Employer says that analytical approach cannot be used to find a section 8 contravention.

Further, and although the Employer does not express the matter in quite this fashion, it seemingly maintains that the *contra proferentem* rule cannot apply here because the employment agreements were not contracts of adhesion. The Employer says: “The Director has not provided the Employer with an opportunity to provide evidence about these contract formation matters, nor is there evidence from these employees about these matters”.

- At paragraph 27 of the Director’s submission, the Director says that the Employer should have been “more explicit” regarding whether 40 hours of work were guaranteed each week. The Employer says that this statement amounts to a concession by the Director that the Employer *was* “explicit” regarding this latter matter, and that “[i]t is extraordinary for the Director to find misrepresentation about the number of hours per week when the Director in his/her own submission acknowledges that [the Employer] was explicit in the contract in not guaranteeing a minimum number of hours per week”.
- The Employer submits that the Director’s statements about what a reasonable person might do when faced with a particular job offer is misplaced. Since there was no evidence from the employees themselves about what was or was not said to them when they signed their employment agreements, the Director was unable to draw any conclusions concerning “reliance”: “Without evidence of reliance, this entire case is a claim about alleged breach of contract, and the Director does not have the jurisdiction to make a determination about such an issue”.
- With respect to the matter of “new evidence”, the Employer maintains that it should be entitled to submit evidence that was not before the delegate during the course of his investigation because it was denied procedural fairness: “…the [new] evidence in question is now being tendered…because [the Employer] only understood the scope of the complaint after the decision of the Delegate”.
- Finally, the Employer makes a belated argument regarding the contents of the section 112(5) record in this matter, now asserting – contrary to its earlier position – that the record is incomplete.

THE EMPLOYER’S APPEAL – FINDINGS AND ANALYSIS

The section 112(5) record

82. Section 112(5) of the *ESA* provides as follows: “On receiving a copy of the request under subsection (2)(b) or amended request under subsection (4)(b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.” The record is supposed to contain all of the documentation that was before the Director when the Determination was made. The contents of the record may determine whether a particular ground of appeal is meritorious – for example, an appellant might argue that they were not given an opportunity to respond to a complaint when the record clearly shows that was not the case; documents that were demanded, but never produced (for example, payroll records), would be presumptively inadmissible as “new evidence” on appeal.

83. The Director delivered a copy of the 284-page record to the Tribunal on October 7, 2019 including separate copies of the record personalized for each respondent employee. There were a number of redactions in the record concerning personal information such as names, e-mail addresses, and contact information. The Director advised the Tribunal that 544 pages of payroll records, originally submitted by the Employer, were not included in the record including payroll records relating to employees not named in the Determination. The Director indicated that these documents would be delivered if required.

84. On October 15, 2019, the Tribunal provided a copy of the record received from the Director to the parties and asked them to indicate whether it was complete and, if incomplete, to provide copies of the missing documents or, at least, provide some particulars about any missing documents (for example, if one party believed that certain documents, not contained in the record, were submitted by another party). By letter dated October 29, 2019, the Employer's legal counsel stated: "We have reviewed the Record and, to the best of our knowledge, it appears to be a full complete Record". However, in its January 27, 2020 reply submission, the Employer stated:

> In terms of the record, which the Director provided to the Tribunal, it makes reference to all of the documents the Director considered, but does not actually attach them to the record provided by the Tribunal. For example, the Director makes reference to the sample contract it was provided by the [Employer]; however, the Director append that sample contract [*sic*, "did not append"?] for the Tribunal to review. Similarly, the Director makes reference to the copies of the redacted complaints provided to the [Employer]; however, the Director did not attach those redacted complaints in the disclosure provided to the Tribunal. Before the Tribunal adjudicates this matter, it should obtain from the Director the sample contract and redacted complaints referred to in the record, but not provided.

85. The Employer's objection to the record, set out as it is in a reply submission, is rather late in coming, especially given the Employer's prior position that the record provided to it was complete. Further, so far as I can determine, some of the Employer's objections are factually inaccurate. The record *does* include copies of the original two complaints (at pages 9 – 16) and a copy of the "sample" employment contract (at pages 17 – 20). The redactions pertain to personal information and this information was appropriately redacted from the record. In my view, the Employer's objections regarding the contents of the record are not well founded. I consider the record produced by the Director to be sufficiently complete in order to adjudicate this appeal.

86. I now turn to the Employer's grounds of appeal.

Breach of the Principles of Natural Justice

87. Since the "new evidence" ground of appeal is largely predicated on a finding in favour of the Employer on its natural justice ground of appeal, I propose to first address this latter ground.

88. The Employer maintains the complainants' individual identities should have been disclosed to it prior to the issuance of the Determination. The Employer asserts that it "was left guessing" about the particulars of the individual claims and thus "could not properly respond". There are several points to be noted with respect to the Employer's argument on this score.

89. First, confidential complaints are specifically permitted under section 75 of the *ESA*. The Employer stood in no different position than would any other employer faced with a complaint filed by an unidentified current or former employee. The Director provided the following rationale for the maintenance of the employees' confidentiality during the course of the delegate's investigation: "Given the precarious nature of the relationship between the [employees] and the [Employer], the names of the individual complainants were kept confidential and their personal information was redacted from the documents provided to the [Employer]." I accept this to be a reasonable explanation, given the particular vulnerability of farm workers generally, and temporary foreign agricultural workers, in particular (a point recognized by the Tribunal in decisions such as *Progressive Inter-Cultural Community Services Society*, BC EST # D159/03 *JKJ Contracting Ltd.*, BC EST # D201/04 and BC EST # D087/07, *Grewal Berry Farms Inc.*, BC EST # D108/07, *Sumas Valley Berry Farm Ltd.*, BC EST # D024/13, and *ICN Consulting Inc.*, BC EST # D024/14, reconsideration refused: BC EST # RD129/14). Further, the Employer has not adequately explained why the public interest demanded that initial disclosure of the employees' identities was necessary.

90. Second, the record shows that the Employment Standards Branch sent, by e-mail, copies of both complaints on September 21, 2018, and by regular mail sent the same date. The BC Fed complaint did not identify the complainants by name. The Dignidad complaint similarly did not identify the employees by name in the body of the complaint, but 12 employees signed the last page of the complaint (although these names were apparently redacted from the copy provided to the Employer). Nevertheless, both complaints – and most particularly, the Dignidad complaint – were very specific about the nature of the various complaints against the Employer. I do not accept that a reasonable person who read the complaints would have been "left guessing" regarding the employees' fundamental allegations. I find that the complaints were explicit regarding the nature of the relief sought.

91. The Branch's October 2, 2018 letter to the Employer enclosed a Demand for Records for "all farm worker employees" for the period from March 21 to September 20, 2018. The records demanded included hours worked each day, records relating to all produce picked each day, copies of all LMIAs and the employment contracts for all temporary foreign workers on site, and "all records relating to the any individual, firm, or agency utilized to source and/or secure employment" for the farm workers in question. The Branch's October 2nd letter also invited the Employer to contact the Branch's Acting Regional Manager (Langley office) "directly if you have any questions". Accordingly, if the Employer had any questions or required further information about the nature of the complaints, it certainly was afforded the opportunity to seek more details.

92. Third, as noted above, on January 11, 2019, and following receipt and review of the Employer's payroll records, the delegate wrote the Employer asking it to conduct a "self-audit". I understand the delegate's letter followed a November 28, 2018 meeting between the delegate and the Employer where a self-audit was discussed. The Employer was given a very clear idea regarding the nature of employees' claims – namely, any employee who did not receive at least 40 hours of paid employment each week would be presumptively entitled to additional compensation up to that threshold.

93. Finally, the Employer's own records identified the employees who did not receive at least 40 hours of paid work each week – recall, the delegate was relying on the Employer's self-audit, in this regard – and if the Employer wished, as it now argues, to "[provide] evidence about the context in which people worked 40 hours

per week and an average of 40 hours per week", it certainly could have done so. There was no mystery after January 11, 2019 regarding the particular employees who were the focus of the delegate's investigation, or regarding the nature of their unpaid wage claims (as the delegate perceived them). In my view, the delegate complied with section 77 of the *ESA*, and did not otherwise fail to observe the principles of natural justice in his dealings with the Employer in the course of investigating and issuing the Determination.

New Evidence

94. "New evidence" is admissible under section 112(1)(c) of the *ESA* where it "was not available at the time the determination was being made". At the outset, it should be emphasized that none of the evidence the Employer now submits – apparently in relation to 47 employees who allegedly failed to report to work and "fled" in breach of their employment contracts – was "unavailable" when the Determination was being made.

95. As discussed above in relation to the Employer's "natural justice" argument, by no later than January 11, 2019, the Employer's own records identified the employees who were the focus of the delegate's investigation (i.e., those employees who did not receive at least 40 hours' paid employment each week). Since the Employer compiled the list of affected employees via its "self-audit", it would have known which of those employees fell into the class of so-called "fled workers". The Employer could have asserted that this group of employees was not entitled to any unpaid wages, but it did not advance any such argument in its February 1, 2019 submission to the delegate. The Employer, in its February 1st submission (which included the results of its self-audit listing each individual employee and their unpaid wage entitlement assuming a 40-hour weekly guarantee), argued that the employees had never been guaranteed 40 hours' paid work each week, but it did not raise any concern about employees having breached their contracts, thereby disentitling them to any relief under the *ESA*.

96. The delegate issued his "preliminary findings" letter on February 15, 2019, in which he addressed the Employer's arguments regarding whether the employees had been given a "40 hour per week employment guarantee", and set out the total amount of wages presumptively due to the employees. As requested, the Employer filed a detailed submission in reply (on March 1, 2019). The Employer's March 1st submission addressed, in detail, whether it had contravened section 8 of the *ESA*. The Employer also argued that the delegate had prejudged the matter thereby breaching the principles of natural justice, by conducting an investigation rather than ordering an oral evidentiary hearing, and by not listing the individual complainants by name. The Employer's March 1st submission made no mention whatsoever of any sort of wage claim offset for wages otherwise owing to the employees who "fled".

97. New evidence is admissible under section 112(1)(c) in accordance with the principles set out in *Davies et al.*, BC EST # D171/03. Under *Davies*, the proffered evidence: i) must not, given reasonable diligence, have been available to be provided to the delegate; ii) be relevant; iii) be credible; and iv) have significant probative value. I am unable to conclude that the evidence relating to the "fleeing workers" meets the stringent test for admissibility set out in *Davies*. As noted above, the Employer was fully aware following its "self-audit" of the names of the employees who were presumptively entitled to unpaid wages and, that being the case, could have made submissions regarding the claims of any so-called "fleeing workers". Evidence and argument relating to this latter matter was available and could have been provided to the

delegate prior to the Determination being issued. Further, since this latter argument appears to have been raised for the first time on appeal, it is not properly before the Tribunal (see, e.g., *Olympic Motors (WC) IV Corporation*, BC EST # D001/17).

98. In addition, it is not clear to me how such evidence is relevant to an employee's unpaid wage claim under the *ESA*. Even if one accepts that some of the employees breached their employment contracts (and I am not finding that to be the case), that would entitle the employer to file a claim for damages for breach of contract in the civil courts. There is no provision in the *ESA* empowering the Director of Employment Standards or the Tribunal to enforce a civil claim for damages by an employer against an employee. If wages are lawfully owed and recoverable under the *ESA*, the Director is obliged to issue a determination for those wages. Any claims that an employer might have against an employee (for example, for failing to provide proper notice of resignation) must be pursued separately in another forum of competent jurisdiction. Employees who voluntarily resign are not entitled to section 63 compensation for length of service (see section 63(3)(c) of the *ES*A). But insofar as a claim against an employee for failing to give notice of resignation is concerned, there is no provision in the *ESA* requiring employees to give any such notice, even though such an obligation may exist at common law.

99. I am not satisfied that the evidence the employer wishes to submit regarding any employees who "fled" is admissible under section 112(1)(c) of the *ESA*. In my view, there is no merit to this ground of appeal.

100. The Employer also submitted some other "new evidence" in support of its argument regarding the proper interpretation of section 8 of the *ESA*, and whether clause 3.1 of the employment contracts constituted a misrepresentation regarding the number of paid working hours to be provided each week. I will summarize this "new evidence", and address the Employer's arguments regarding the admissibility of it, below, as part of my analysis relating to the alleged errors of law committed by the delegate.

Errors of Law

101. The Determination, although framed as a decision under section 8 of the *ESA*, is fundamentally predicated on the delegate's interpretation and application of the employees' employment contracts and, in particular, clause 3.1 of those standard form agreements. The Employer submits: "The Director does not have the jurisdiction to generally interpret contracts to determine liability and damages owed arising from that interpretation (unless the contractual interpretation is directly linked to a breach of the legislation)." I accept that neither the Director nor the Tribunal has the general jurisdiction to interpret, apply, and enforce employment contracts. For example, there is no jurisdiction in the Director/Tribunal to award severance pay in lieu of reasonable notice, or to award damages for breach of an express notice of termination provision providing for compensation beyond that provided for in section 63 of the *ESA*. Contractual provisions relating to matters that are not grounded in the *ESA* (for example, payments required to be made under an employer's pension plan) must be pursued in the civil courts.

102. The Director's jurisdiction to issue a determination must be grounded in the *ESA*. However, in my view, the Employer's unpaid wage liability, as fixed by the Determination, flows directly from a breach of the *ESA*. Section 1(1) defines "wages" as, *inter alia*, "salaries, commissions or money, paid or payable, by an employer to an employee for work" and as "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency". The delegate interpreted clause 3.1 of the employment

contract as guaranteeing the employees not less than 40 hours of paid employment each week. In effect, clauses 3.1 and 4.1 can be reasonably interpreted as providing for a $454 weekly *salary* (40 hours x $11.35). This guaranteed weekly salary served as an incentive for the employees to accept employment with the Employer. The Determination simply reflects wages that were held to be payable under the employees' standard form employment contracts. In my view, the delegate was acting wholly within his statutory authority when he simply enforced the parties' wage bargain. Issuing determinations for unpaid "wages", as defined in the *ESA*, constitutes the very core of the Director's jurisdiction. I am not satisfied that that the delegate made a "palpable and overriding error" in interpreting the parties' wage-effort bargain.

103. Similarly, although a false representation, as defined by section 8 under the *ESA*, can be (and perhaps typically is) found in an oral pre-hire statement made to a prospective employee, a section 8 contravention could flow from a written representation included in a standard form employment agreement.

104. The Determination is predicated on the delegate's finding that the terms of the employees' standard form employment contracts – and, in particular, clause 3.1 – constituted an express representation to the employees that they would be provided (and paid) for no less than 40 hours of work each week. The delegate held that this provision was a representation within section 8 of the *ESA*. For ease of reference, I have reproduced both clauses 3.1 and 4.1 of the employees' employment contracts, as well as section 8 of the *ESA*, below (the <u>underlined</u> portions reflect text that was inserted into the standard form "Employment Contract":

> 3.1 The temporary foreign worker shall work <u>40</u> hours per week and shall receive [blank]% more than the regular wages for the hours worked over this limit, where provincial law permits. His/her workday shall begin at [blank] and end at [blank] or, if the schedule varies by day, specify: <u>rotational shifts, may require varied start and end times</u>
>
> 4.1 The employer agrees to pay the temporary foreign worker, for his/her work, a wage of $ <u>11.35</u> per hour or per piece rate (applicable in British Columbia only as set out in the "Minimum Wage Rates – Hand harvested crops" published in the British Columbia Ministry of Skills Development and Labour for harvesting). These shall be paid at intervals of <u>biweekly</u>
>
> * * * * *
>
> 8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
>
> (a) the availability of a position;
>
> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.

105. The Employer says that in light of the individual employee's obligation to work rotating shifts when required, and the fact that the nature of the work was somewhat weather dependent, the contract contemplates working days and weeks of varying duration. In fact, according to the Employer, "the average time worked for 185 of the Foreign Workers was 40 hours per week [and] [o]nly 4 of the Foreign Workers had an average of less than 40 hours per week."

106. The Employer says that clause 3.1, when interpreted in light of certain other provisions of the agreement and "the nature of a farm operation", cannot be read as guaranteeing 40 hours of paid work in any particular week. Rather, a "plain reading of clause 3.1 indicates that the obligation is on the Foreign Workers to provide 40 hours of work as a 'limit' before additional pay is provided." The Employer maintains that the combined effect of clauses 3.1 and 4.1 is that the *only* obligation placed on the Employer is to pay the agreed hourly wage for each hour worked, and to pay additional wages if the employee exceeds 40 working hours in a given week. The Employer says that if it intended to guarantee 40 hours of paid employment each week, the contract would have simply provided for a weekly salary equivalent to 40 hours at the contract wage rate. However, to the extent that the contract guaranteed 40 hours of paid employment each week, at an $11.35 per hour wage rate, the contract effectively provided for a $454 weekly salary.

107. As for interpreting clause 3.1 to be a guarantee of 40 hours of paid work each week, the Employer says that the agreement "is not sufficiently unequivocal and explicit to provide a guarantee of *payment* of 40 hours per week" (*italics* in original text). The Employer says the delegate erred in law by interpreting clause 3.1 as guaranteeing 40 paid working hours each week, and that if the parties' intended to provide for 40 hours of paid employment each week, regardless of the number of hours actually worked, the contract could have been drafted to clearly reflect that specific intention

The Proper Interpretation of Clause 3.1

108. Although, by regulation, "farm workers" are not entitled to either statutory overtime pay or statutory holiday pay (see *Regulation*, section 34.1), under the *ESA*, "farm workers" who are paid an hourly wage (to be contrasted with "piece rate" compensation) are entitled to be paid for every hour worked. It would appear that clause 3.1 contemplated the payment of "overtime" or "extra" pay (i.e., above the base hourly rate) for hours worked over a 40-hour weekly limit, but this additional pay proviso was left blank in the contracts and, as noted, "farm workers" are not entitled to overtime pay under the *ESA* (thus, any such entitlement would have to be found in an employment contract). The combined effect of clauses 3.1 and 4.1 is that the employees would receive $11.35 for every hour *worked*. The key question, of course, is whether the employees' contracts obliged the Employer to pay $11.35 for each hour *not worked* in a particular week up to a total of 40 paid hours for both working and non-working time.

109. The Employer says that the delegate's interpretation of the employees' employment contracts "is a question of general law about which the Delegate must be correct." The proper test for reviewing an error with respect to a pure question of law is whether the original decision-maker was "correct" in his or her interpretation of the legal question (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8).

110. In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, the Supreme Court of Canada ("SCC") recognized that "[h]istorically, determining the legal rights and obligations of the parties under a written contract was considered a question of law" (para. 43). However, the SCC also acknowledged that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" and, accordingly, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." The SCC also cautioned that "[c]onsideration of the surrounding circumstances recognizes that ascertaining contractual intention

can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para. 47). The SCC concluded that the historical approach should now be abandoned in favour of an approach that treats the interpretation of a contract as a question of mixed fact and law: "…the historical approach should be abandoned [since] contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50). The proper test for reviewing a question of mixed fact and law is whether the decision-maker made a "palpable and overriding error" unless the decision maker made a discrete and extricable legal error, in which case the "correctness" standard applies (*Housen*, *supra*, at para. 36).

111. In this case, two separate interpretations have been advanced regarding clause 3.1. The delegate held that the "plain meaning" of this provision requiring the employees to work 40 hours each week (i.e., "[t]he temporary foreign worker shall work 40 hours per week") was that "they will be provided with 40 hours of work a week" (delegate's reasons, page R16). The Employer, by contrast, maintains that the "plain meaning" of clause 3.1 is that the employees were obliged to work *up to* 40 hours per week before additional pay was required; in other words, the Employer submits that "40 hours of work per week [was] a 'limit' before additional pay is provided".

112. As the SCC directed in *Sattva*, *supra*, clause 3.1 must be interpreted in light of the underlying factual matrix. In my view, the Employer, by using the phrase "*shall* work 40 hours per week", imposed a mandatory obligation on the employees to provide 40 hours of paid labour each week. In light of that language, if the employee wilfully refused to work, say, no more than 20 hours in a given week, the employee would be in breach of contract. On the other side of the ledger, the Employer – having brought the employees to its farm in accordance with the TFWP – was not entitled, under the contracts it signed with the employees, to then offer them, for example, only 10 hours of paid employment each week.

113. If the Employer's position that there was no weekly working hours guarantee truly reflected the parties' mutual intentions, clause 3.1 could have easily stated that the employee "may be required to work up to 40 hours per week". In the circumstances of this case, the Employer was, essentially, importing labour for its farm operation and no doubt wished to ensure that its labour complement would meet its production requirements. The number of temporary foreign workers it sought federal authority to hire reflected the scope of its farm operation, and the labour it needed in order to meet its production requirements. If these employees were free to work fewer than 40 hours in a week, the Employer would have to hire additional workers in order to meet its production requirements, thereby increasing its administrative and labour costs.

114. As for the employees, and as noted by the Director, they were invited to leave their home country and no doubt wanted to have some certainty regarding their likely earnings under their contracts. The 40-hour guarantee of paid hours each week effectively constituted an "incentive" to the workers "relat[ing] to hours of work" and thus fell within the statutory definition of "wages". I think it also important to recall that the LMIAs issued to the Employer, and pursuant to which the Employer was authorized to recruit temporary foreign workers, stated that the workers' "hours of work" would be "40.00 hour(s) per week".

115. In *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311, the B.C. Court of Appeal provided the following guidance regarding the interpretation of employment contracts (at para. 15):

> …As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers. Nevertheless, the construction of an employment contract remains an exercise in contractual interpretation, and the intentions of the parties will generally prevail, even if this detracts from employment law goals that are otherwise presumed to apply

116. Interpreting clause 3.1 as mandating 40 hours of paid labour each week is consistent with the notion of protecting vulnerable employees but, more importantly, it is also consistent with both the Employer's and the employees' reasonable expectations regarding their respective contractual rights and obligations. However – and I wish to stress this point – in my view, clause 3.1 is not ambiguous. Clause 3.1 simply reflects a mutual obligation on the part of the Employer and the employee regarding the number of hours (40) to be worked each week; as it plainly states, the employee *shall* work 40 hours each week. Clause 4.1, in turn, simply fixes the wages required to be paid to the employee, based on a 40-hour work week. In examining the contract, I note that although clause 3.1 states that the employee's shifts may "vary" with different start and end times each day, and that the employee's one day off each week will "vary" from week to week (clause 3.3), the contract does not provide for any "variability" regarding the number of hours to be worked each week, nor does it expressly state that the employee will work an *average* of 40 hours each week. As I interpret clause 3.1, the Employer was under a contractual duty to provide 40 hours of paid work each week.

117. As the SCC observed in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, "an interpretation of the [Employment Standards] Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not." One of the purposes of the *ESA* is "to encourage open communication between employers and employees" (section 2(c)). If the Employer intended to convey to the employees that, in fact, they were being recruited to come to Canada with no guarantee whatsoever that any paid work would be made available to them after they arrived at the Employer's farm (the logical upshot of the Employer's position regarding clause 3.1), then much clearer contractual language was required.

118. I agree with the delegate that the effect of clause 3.1 of the employment contracts was to guarantee no less than 40 hours of paid work each week for the employee. At the very least, I am satisfied that the delegate did not make a "palpable and overriding error" in interpreting clause 3.1. Under clause 3.1, if an employee worked more than 40 hours each week they would not be entitled to any overtime premium. However, because "farm workers" are excluded from Part 4 of the *ESA* by section 34.1 of the *Regulation*, that overtime exemption was lawful. Of course, under both the *ESA* and the employment contracts, the employees were entitled to be paid at their regular hourly rate for each additional hour (beyond 40) worked in a week. In my view, the effect of clause 3.1 was to mandate a minimum 40-hour paid work week and to provide for additional pay, at the regular wage rate, for any hours worked beyond 40 in a week.

119. If I am wrong in that interpretation, I nonetheless consider the employment contracts at issue here to be contracts of adhesion, and to the extent that there is any ambiguity regarding the true meaning of clause

3.1, the interpretation favouring the employees' position should be preferred, consistent with the *contra proferentem* interpretive principle.

The Contra Proferentem Interpretive Principle

120. The delegate held that on a plain reading of the employment contract, it guaranteed the employees at least 40 hours of paid employment each week. Alternatively, and although the delegate did not use this term, he held that an application of the *contra proferentem* rule also dictated an interpretation in favour of the employees (pages R16-R17):

> I find that any ambiguity in the terms of the contract should be interpreted against the interests of the Employer, who as noted above, is responsible for preparing the contract under the Federal Government TFW Agricultural Stream program. This accords with the long established principle that when two contracting parties disagree on a contractual provision, the preferred meaning should be the one that works against the interests of the party who provided the wording.

121. The delegate, as noted above, also relied on the B.C. Court of Appeal's decision in *Miller v. Convergys CMG Canada*, *supra*, to support his interpretation of the employees' employment contracts.

122. I do not understand the *contra proferentem* interpretive principle to apply simply because, as the delegate stated, "two contracting parties *disagree* on a contractual provision" (my *italics*). As I understand the principle, the decision-maker must first determine if the disputed contractual language is ambiguous, in the sense that it is reasonably capable of supporting more than one interpretation. In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 41, a case involving the interpretation of a loan guarantee, the SCC majority indicated that the rule should only be applied where there is a contract of adhesion; in other words, a standard form agreement where a party accepts the terms offered by the other party with "little or no part in the negotiation of the agreement" and is, essentially offered a "take it or leave it" bargain (para. 7). The majority continued (at para. 8): "… it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule." The majority adopted this statement of the rule (at para. 9):

> Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum [sic*] rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

123. The three dissenting justices in *Manulife Bank*, *supra*, adopted a substantially similar view (at para. 80):

> When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did not draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the

intentions of the parties, as expressed by their written contract, have failed. (underlining in original text)

124. More recently, the B.C. Court of Appeal addressed the *contra proferentem* rule in the context of employment contracts. In *Alsip v. Top Rollshutters Inc. dba Talius*, 2016 BCCA 252, the court emphasized that, in light of the SCC's decision in *Sattva*, *supra*, one must take into account the surrounding circumstances when the contract was negotiated in determining if a written employment agreement actually is ambiguous. In *Pepin v. Telecommunications Workers Union*, 2017 BCCA 194, the court emphasized two important points regarding the *contra proferentem* rule. First, "[b]efore resorting to *contra proferentem*, the [decision-maker] should [consider] whether the factual matrix and the extrinsic evidence would resolve any ambiguity in the terms (para. 6); second, "the principle of *contra proferentem* is generally reserved for situations where one party has had no meaningful opportunity to negotiate the contract" (para. 7).

125. The Director submits that in construing clause 3.1 ("The temporary foreign worker shall work 40 hours per week…"), an important surrounding circumstance is that the employees would not have agreed "to uproot themselves to come to a foreign country where they are not guaranteed any hours of work". The Director maintains that clause 3.1 is clear and unambiguous but, even if it could be characterized as ambiguous, the provision should be interpreted using the *contra proferentem* rule as against the Employer. In particular, the Director, citing *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R., says that "[o]ne of the primary purposes of the *ESA* is to protect employees who have unequal bargaining power and are vulnerable compared to their employers". Further, the Director submits that the employees' vulnerability in this case "is compounded by factors such as language, culture, immigration status, often extreme poverty, and the fact that they typically come to Canada on a fixed-term contract held by a single employer". The Dignidad submission details various facts and circumstances that underscore the employees' vulnerability. However, I am not relying on these assertions inasmuch as this evidence was not before the delegate and thus the Employer was never afforded an opportunity to test its veracity, or to offer its own rebuttal evidence. Nevertheless, I am satisfied that temporary foreign workers, *by the very nature of the TFWP itself*, constitute a vulnerable class of employees (see, above, regarding the Tribunal's oft-stated position in this regard).

126. The Director maintains that the employees were presented with "take it or leave it" offers of employment and that the standard form employment contract used (taken from a federal government website) was one the Employer chose to adopt. In essence, the Director says (without using this particular term), the employees' contracts were contracts of adhesion.

127. The Employer maintains that the delegate had no jurisdiction to interpret and apply the employment contract because "questions of pure contract interpretation fall within the jurisdiction of the courts, and not the Director". As for the application of the *contra proferentem* rule, the Employer says that since the Director concedes that there are two "equally consistent" interpretations of clause 3.1, "this necessarily means that the Employer's interpretation is entirely consistent with the language of the contract". In a somewhat similar vein, the Employer says the Director's argument that the Employer should have been "more explicit" in the contract with respect to there being no guaranteed 40-hour work week, necessarily

implies that the Employer must nonetheless have communicated to the employees that there was no such guarantee (i.e., the Employer *was* explicit, but not as explicit as it could have been).

128. With respect to the Director's evidence that could be taken as relating to the "surrounding circumstances" within the *Sattva* principles (the Director did not specifically refer to *Sattva* in her submission), the Employer says that "the Director has not provided the Employer with an opportunity to provide evidence about these contract formation matters, nor is there evidence from the employees about these matters".

129. Further, the Employer maintains that, ultimately, the discussion about contract interpretation and the possible application of the *contra proferentem* rule is fundamentally misconceived because the underlying basis for the Determination was that the Employer misrepresented the terms and conditions of the work (especially regarding the paid amount of work guaranteed each week) and thereby contravened section 8 of the *ESA*.

130. As I noted above, in my view, there simply is no ambiguity regarding the proper interpretation of clause 3.1. However, to the extent that I have erred in that regard, I am of the view that the employees' employment contracts constitute contracts of adhesion. The delegate made the following finding of fact, which the Employer has not challenged: "It is the employer's responsibility to obtain a LMIA [*sic*], and to draft and send the employment contract to the prospective worker" (page R11). The delegate also noted that under the TFWP, the burden is on the employer to prepare a "detailed" employment contract that includes information about wages and hours of work and other terms and conditions of employment. In my view, these factual findings support the notion that the employees' employment contracts were, in fact, contracts of adhesion. I wish to caution, however, that it appears the delegate never had any direct communications with any of the employees named in the Determination and thus, evidence about how these employment contracts were actually negotiated and concluded is absent. Similarly, the Employer never presented any evidence regarding the negotiations, if indeed there were any, with respect to the employees' employment contracts.

131. As contracts of adhesion, the benefit of any doubt regarding the true meaning of the agreement (taking into account the surrounding circumstances), should be resolved in the employees' favour. The Employer maintains that clause 3.1 only fixed a 40-hour work "limit" before any additional pay would be required. In my view, the Employer's proposed interpretation is not one that the language can reasonably bear and, in any event, must be rejected in favour of the delegate's interpretation.

132. Clause 3.1 must be interpreted in light of the *ESA*, and under the *ESA* employees must be paid for all hours worked even if they are otherwise excluded from statute's premium pay overtime provisions. Since clause 3.1 did not provide for any premium pay for work beyond 40 hours (the "% more" line, relating to "hours worked over this limit" was left blank), to interpret clause 3.1 as only guaranteeing additional pay for work beyond 40 seems superfluous in light of the mandatory provisions of the *ESA*. I note that employers are directed, under the TFWP, to draft agreements that "respect provincial labour laws that establish minimum employment standards" (delegate's reasons, page R11). A much more plausible reading of clause 3.1 is that it imposes a burden on the employee to work 40 hours each week and, by reasonable implication, a concomitant obligation on the Employer to pay the employee a weekly wage based on 40 hours at the contractually agreed hourly wage rate.

133. Accordingly, I do not find the Employer's interpretation of the obligation fixed by clause 3.1 to reflect a reasonable interpretation, but even if it were, and applying the *contra proferentem* rule, I would interpret the provision in favour of the more reasonable interpretation favouring the employees.

Section 8 Representations

134. With respect to the interpretation of section 8 of the *ESA*, the Employer maintains that it is a "pre-hiring provision" that only applies to representations made prior to the employment relationship being formalized. The Director, disavowing the position taken by the delegate at page R14 of his reasons, agrees that section 8 is a "pre-hire provision", but also says that events that occurred post-hire are relevant when determining if there was a misrepresentation.

135. The Employer says that the burden of proof lies on a complainant to demonstrate that a pre-hire representation is untrue and that the delegate had no evidence before him "that the content of Clause 3.1 was untrue at the time it was made." The Employer's submission continues:

> Once the contract of employment was signed, Section 8 of the Act no longer applied…
>
> …the fact that the Foreign Workers did not necessarily receive 40 hours of work each week cannot be cast as a misrepresentation in the hiring process. It may be that failing to provide 40 hours per week is a breach of contract; however, it is not a misrepresentation pursuant to section 8 of the Act. Whether there has been a breach of the contracts by failing to provide 40 hours of work per week is not at issue in these proceedings…
>
> …When the Employer made the statement, it was for all intents and purposes true. If the weather was good, the Employer would have provided these workers 40 hours each week, and perhaps more than 40 hours.

136. The Employer also argues that there was no evidence before the delegate that any of the employees relied on any sort of representation that might have been made regarding the number of paid working hours offered each week. While denying that clause 3.1 constitutes such a representation, the Employer maintains that "[w]ithout evidence of reliance, no finding of misrepresentation can be made."

137. Although clause 1.1 of the employment contracts states that the contract was for "a duration of 6 months from the date the temporary foreign worker assumes his/her functions", the delegate determined that the employees were not guaranteed 6 months' work, or 6 months' wages if their employment ended before 6 months had elapsed (delegate's reasons, page R12). Clause 9.1 of the employment contract allows the employee to quit on 1 week's notice; clause 10.1 allows the Employer to terminate the employee by giving 1 week's notice, but only after having completed 3 months' service. In light of these provisions – the effect of which was to provide virtually no security of tenure – the Employer says:

> ...if a person knows that they have no guarantee of duration of employment, the fact that a contract might guarantee 40 hours per week for an unknown duration cannot be a representation which reasonably induces, influences or persuades a person to become an employee or work or be available for work. In fact, the opposite inference can and should be drawn in the circumstances: namely, that clause 3.1 would not reasonably induce, influence or persuade a person to become an employee…

> …the contract does not provide Foreign Workers with any job security; their employment could be terminated at any time. As a result, the only reasonable inference to be drawn…is that the Foreign Workers were not induced, influenced or persuaded to become an employee by clause 3.1 of the Contract.

138. In my view, it was not necessary, strictly speaking, for the delegate to find that there was a false representation within section 8. The delegate interpreted the employment contract as guaranteeing the employees 40 hours of paid employment each week. As noted above, I agree with that interpretation. The Employer agreed to pay the employees not less than 40-hours' pay per week at the contractually-agreed wage rate regardless of the number of hours worked (up to 40), and to pay for any additional work beyond 40 hours in a week at the same agreed per hour wage rate. That being the case, the wage payment orders issued in favour of the employees are simply orders to pay wages in accordance with the *parties'* wage-effort bargain. I note that the BC Fed complaint did not refer to any pre-hire representations. Rather, the complaint was that the employees had a *contractual* right to a minimum of 40 hours of paid employment each week: "As per the attached contract, the workers were to receive 40 hours pay per week…As per the contract, the workers should receive no less than 80 hours pay every two weeks" (my underlining).

139. Turning to section 8, I agree with the delegate's analysis that this provision is not limited to representations that are made prior to the execution of an employment contract. It follows that I reject both the Employer's and the Director's (but not the delegate's) position that section 8 is strictly a "pre-hiring provision". The introductory language of section 8 clearly applies to representations made before an individual has "become an employee" regarding such things as the nature of position offered, the wages to be paid (or the compensation that an individual could reasonably expect to earn), or the conditions under which the work will be undertaken (see, for example, *Hamilton*, 2020 BCEST 4; *Parsons*, BC EST # D110/00, reconsideration refused: BC EST # D513/00; *323573 BC Ltd. d.b.a. Saltair Neighbourhood Pub*, BC EST # D478/97).

140. However, section 8 also covers representations made to an individual so that they will "work" or "be available for work", which could cover post-hiring representations. For example, an employer might entice an employee to work a weekend shift (on the employee's usual day off) by offering premium pay (say, double time); such an inducement could readily fall within section 8 if the employer reneged on the promise. I also note that section 8 extends to representations about "conditions of employment" which is a very broadly defined term: "conditions of employment means all matters and circumstances that in any way affect the employment relationship of employers and employees". The use of the phrase "the employment relationship of employers and employees" appears to pre-suppose an existing, not merely a prospective, employment relationship. In my view, if an employee were persuaded not to resign (and, in turn, to refuse another job offer) because, say, the employer promised the employee a raise and/or a promotion, that sort of promise could form the basis of a section 8 claim if the employer refused to honour it.

141. As noted above, the BC Fed complaint was framed as a contractual claim for wages rather than a section 8 claim for compensation based on false representations made to the employees regarding their anticipated remuneration. The Dignidad complaint specifically referred to the employees being promised "6 months of work for a minimum of 40 hours per week", but also referenced the employees' contractual entitlement to like effect. Indeed, as I read the entire Dignidad complaint, it appears to be principally framed as a contractual claim for unpaid wages.

142. There is nothing in the delegate's reasons to indicate that he spoke with any of the employees in order to obtain their evidence about what might have been represented to them regarding their compensation. The delegate appears to have relied exclusively on the employment contracts as evidence of the alleged representations: "I find the employment contract is valid evidence upon which to determine whether [the Employer] influenced the employees in question to become employees and to work or be available to work by misrepresenting the conditions of employment, and I turn to an examination of the contract" (delegate's reasons, page R14). The delegate determined that the contracts constituted the "best and most persuasive evidence" regarding the representations made to the employees. The delegate ultimately determined that the contracts, and particularly clause 3.1, constituted section 8 representations to the employees regarding "the total remuneration he or she can expect to receive based on 40 hours a week multiplied by the established hourly rate" (page R16).

143. In essence, the delegate concluded that the employment contracts constituted – or perhaps were corroborating evidence of – pre-hire representations made to the employees regarding their compensation. The delegate then interpreted the contract to find a contractual promise to provide not less than 40 hours of paid employment each week.

144. The remedy for a section 8 contravention is found in section 79(2) of the *ESA*, the so-called "make whole" provision. In this instance, the delegate appears to have limited the compensatory order to the wages the employees were entitled to receive under their employment contracts. The delegate did not award any additional compensation for any other losses or expenses that were outlined in the Dignidad complaint (for example, the employees claimed wrongful deductions for medical insurance, costs incurred as a result of improper tax deductions, and aggravated damages – I am not suggesting that these are valid claims, I only note that the delegate did not address them in his reasons).

145. As previously noted, there was no evidence before the delegate from the employees regarding what the Employer, or its authorized representatives, may have said to them regarding their compensation. Nevertheless, I am prepared to accept that a provision in a standard form contract of adhesion, used to solicit temporary foreign workers under the auspices of the federal government's TFWP, and presented to an individual for their signature as a pre-condition to that individual securing a Canadian work permit, *could* constitute a section 8 representation regarding such things as the availability of a position, the wages to be paid, and other conditions of employment.

146. However, in this instance, the delegate found that the employees were owed wages in accordance with the terms of their employment contracts. The remedy granted in favour of each employee was simply a payment order based on the wages that were required to be paid under their contracts. While there may have been specific representations made to the employees when they were first hired, there is no evidence whatsoever in the record regarding the content of any such representations. The Dignidad complaint asserted that the workers were "hired…with the promise of giving them 6 months of work for a minimum of 40 hours per week", but since the delegate never interviewed any of the employees, evidence that might have been obtained regarding these alleged promises was never secured.

147. The Employer maintains that there is an evidentiary burden on the employees to demonstrate that the representations contained in their employment contracts "[were] untrue at the time [they were] made".

However, the truth or falsity of the Employer's representation regarding the number of paid working hours the employees would receive each week simply cannot be determined, in this case, as of the point in time when the representation was made (i.e., on or before the day/time when the employee signed their employment contract). The representation at issue here was not one about an *existing* state of affairs – as was the case in *Queen v. Cognos*, [1993] 1 S.C.R. 87, a decision cited by the Employer in its submission to the delegate. In this latter circumstance, the accuracy of the representation can be objectively determined to be either true or false as of the moment the representation is made. Here, the representation was in regard to the compensation the employees would receive should they accept employment with the Employer. In this case, the key question cannot be whether the representation was true or false when it was made, since it related to a *future* state of affairs. Rather, the key questions are: first, was such a representation made?; second, if so, did it "induce, influence or persuade" the employees to accept employment?; and, third, did the representation ultimately prove to be a misrepresentation because the Employer refused to pay the employees the remuneration it represented they would receive?

148. On this point, I should add, simply for the sake of completeness, that the Employer never presented any evidence demonstrating that it originally told the employees that they might receive less than 40 hours of paid employment each week. The only representation the Employer concedes it may have made was that the employees would be provided with 40 hours of paid employment each week "[i]f the weather was good". The Employer never asserted during the course of the delegate's investigation that it may have made this latter representation. It appears that this assertion has been advanced for the very first time in these appeal proceedings. On that basis, the Employer is foreclosed from pursuing this argument under the *Tri-West Tractor*/*Kaiser Stables* principle (see BC EST # D268/96 and BC EST # D058/97). Even if the Employer had submitted some corroborating evidence regarding its present position about the nature of the representation it actually made with respect to the "40 hours per week" issue, that new evidence would not be admissible on appeal (see *Davies et al.*, *supra*).

149. The Employer also submitted that if it made any sort of representation, it went no further than guaranteeing an *average* of 40 paid working hours per week over the course of the employees' employment. The Employer notes that the payroll records relied on by the delegate show that, save for 4 employees, all averaged 40 working hours per week during their employment. That being the case, the Employer argues that these employees "did not suffer any [financial] detriment by relying on the representation that they would receive 40 hours per week."

150. The Employer's argument presupposes that one accepts that the Employer represented to the employees that they would work, *on average*, 40 hours each week rather than, as found by the delegate, that the employees *would be paid* for not less than 40 hours each week. As discussed above, there was no evidence before the delegate regarding a representation to the employees that they would work, *on average*, 40 hours each week (to be contrasted with a representation that they would be paid for 40 hours of work each week regardless of the actual number of hours actually worked), and the Employer never advanced this position during the course of the delegate's investigation.

151. Nevertheless, there is simply no cogent evidence in the record regarding what the Employer, or its agents, might have been represented to the employees regarding the duration of their employment or with respect to any weekly wage guarantee.

152. The Employer submits evidence, not previously provided to the delegate, regarding certain employees to support its position that clause 3.1 of the employment contracts did not induce, influence, or persuade employees to work for the Employer. The Employer says that 48 of the complainants worked for the Employer in 2017 (the previous season) and signed "identical" contacts. These employees did not work 40 hours each and every week, and thus "would have been aware that the nature of the work was such that 40 hours a week was not guaranteed."

153. The Employer also submitted "new evidence" that at least 10 of the employees did not speak English, and were not provided with Spanish translations of their employment contracts prior to signing them. Since these employees could not read the contract, they cannot be taken to have been induced, influenced, or persuaded to work by any provision of the contract.

154. In my view, this evidence about the prior 2017 season and regarding some employees' English proficiency is not admissible in this appeal. This evidence was available prior to the issuance of the Determination. Additionally, what may or may not have been represented to the employees in 2017 is not necessarily probative regarding what they might have been told prior to hiring on for the 2018 season. As discussed above, the Employer's written response to the delegate's request for "submissions and evidence" in answer to the delegate's January 11th preliminary findings letter included extensive argument regarding the scope of section 8 of the *ESA*, and its application in the case at hand. However, the Employer did not advance, at any point in its submission, the arguments or evidence it now presents regarding the employees who returned following the 2017 season, or those employees who apparently do not speak English.

155. The Employer says that even if clause 3.1 could be construed as a representation about the remuneration the employees would receive (i.e., 40 hours of paid work each week), section 8 requires a nexus between the representation on the one hand, and accepting employment or making oneself available for work, on the other. This nexus is found in the section 8 requirement that the representation induces, influences or persuades a person to "become an employee, or to work or to be available for work". The Employer submits that there was no evidence before the delegate regarding the employees' reliance on the representation made about their weekly paid hours of work.

156. The delegate's reasons do not address – certainly not expressly – the section 8 "induce, influence or persuade" requirement. As noted, the delegate never spoke to any of the employees during the course of his investigation. The Employer notes that under the terms of the employment agreements, the employees were not guaranteed 6 months' employment (see delegate's reason, page R12). In addition, they had very limited security of tenure as they could be summarily terminated, without cause, with very little notice, and in some cases, with no notice whatsoever (discussed above). In light of these facts, the Employer says that it cannot be assumed that the employees – with no guaranteed duration of employment and virtually no security of tenure – were induced to accept employment on the basis of a promise of 40 hours of paid work each week.

157. On the other hand, it may be that the employees – precisely because they did not have guaranteed employment for 6 months, or any meaningful security of tenure – were induced to accept employment knowing that they would be provided with not less than 40 hours of paid employment each week. The Director says that the fact the employees signed employment contracts and then left their home country to

come to work at the Employer's farm in Pitt Meadows is, of itself, evidence showing that they relied on the representations contained in the contracts.

158. In the absence of any evidence from the employees, accepting either alternative, it seems to me, is somewhat speculative. The delegate appears to have proceeded on the basis that the contract terms (and, especially, clause 3.1 as interpreted by the delegate), rather than any separate statements or promises made by or on behalf of the Employer, induced the employees to accept employment with the Employer: "I find the employment contract is valid evidence upon which to determine whether [the Employer] influenced the employees in question to become employees…" (delegate's reasons, page R14).

159. In the circumstances of this case, and given the lack of any direct evidence from either the employees or the employer regarding representations that may or may not have been made to certain of the employees, I am of the view that the delegate's findings with respect to the promise of a "weekly wage guarantee" and the concomitant breach of section 8 must be set aside. This matter will be referred back to the Director to be considered anew by way of a process that affords both the Employer and the employees a reasonable opportunity to present their respective evidence and argument.

160. It should also be noted that since the employees had a *contractual* entitlement to be paid for not less than 40 hours at their regular wage rate each week, it is not particularly relevant whether they were induced to accept employment based on clause 3.1 of the agreement. The wage payment order issued in this case merely crystallizes the wages that the employees were entitled to receive under their employment contacts. In my view, given the nature of the section 79(2) remedial order issued in this case, it was not necessary to make a finding regarding whether the Employer contravened section 8.

SUMMARY OF FINDINGS REGARDING THE EMPLOYER'S APPEAL

161. In the circumstances of this case, the delegate complied with section 77 in his dealings with the Employer during the course of his investigation. In my view, the delegate did not breach the principles of natural justice in making the Determination insofar as his dealings with the Employer are concerned.

162. I am not satisfied that the delegate erred in law in interpreting the parties' employment contract. However, in my view, the delegate's reasons do not support his finding that the Employer contravened section 8. Further, and with respect to this latter matter, the delegate did not, in my view, issue a "make whole" order as contemplated by section 79(2). Rather, the delegate simply issued an order regarding the unpaid wages that were owed to the employees under their employment contracts. The section 8 issue will be referred back to the Director. It follows that the $500 penalty issued in relation to the section 8 contravention must be cancelled, although I suppose the Director could simply substitute a separate $500 penalty relating to the failure to pay all wages due and payable to the employees.

163. The Employer's so-called "new evidence" was available at the time the Determination was being made, and could have been provided to the delegate had the Employer wished to so do. This evidence is not admissible in these proceedings.

164. I now turn to the Dignidad appeal.

DIGNIDAD'S REASONS FOR APPEAL

165. Dignidad says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Dignidad also says that it has relevant evidence that was not available when the Determination was being made.

166. Dignidad claims the employees are entitled to both individual (section 63) and group (section 64) termination pay. Although the delegate's reasons do not address termination pay, that is hardly surprising since this issue was not mentioned in Dignidad's original complaint, or in the BC Fed complaint. Similarly, Dignidad says that the Employer contravened section 32 of the *ESA* (mandatory 30-minute meal break after working 5 hours), an issue that was not addressed in the delegate's reasons. However, so far as I can tell, this section 32 issue was never raised in Dignidad's original complaint. Dignidad now says that employees were called to work and then sent home without any pay, in violation of section 34 of the *ESA*. This issue was not raised in either the Dignidad or BC Fed complaint, and was not adjudicated by the delegate.

167. Since the section 32, section 34, section 63, and section 64 claims were never advanced in Dignidad's (or in the BC Fed's) original complaint, and thus never adjudicated, those matters are not properly before me in these appeals (see *Kaiser Stables Ltd.*, BCEST # D058/97 and *Tri-West Tractor Ltd.*, BC EST # D268/96).

168. Dignidad's appeal submissions raise other matters that are not within the jurisdiction of either the Director, or the Tribunal, such as claims with respect to bullying, verbal and physical harassment, mistreatment, substandard housing, and improper preferential work allocation. Dignidad's submission also raises matters that could fall under the *Workers Compensation Act* (for example, retaliation for filing workplace accident complaints). These allegations are not properly before me in these proceedings.

169. The reasons for appeal that I consider to be properly before me are summarized, below.

Alleged Errors of Law

170. Dignidad says that the methodology adopted by the delegate to calculate the employees' unpaid wages (i.e., relying on the Employer's self-audit) "was fundamentally wrong and unfair", particularly since the delegate accepted the Employer's unpaid wage calculations without giving the employees an opportunity to review and challenge those calculations prior to issuing the Determination.

171. In my view, this allegation could be more appropriately characterized as a breach of the principles of natural justice. Regardless, Dignidad says that the Employer's unpaid wage calculations yield unpaid wage amounts that at least some of the employees believe to be incorrect.

172. Although not explicitly framed as an "error of law", Dignidad maintains that the delegate misinterpreted clause 1.1 of the contract as not guaranteeing a minimum 6-month period of employment. Dignidad maintains that this promise of "security that the job will exist for that [i.e., 6-month] time" was a critical aspect of the representations that induced the employees to accept the Employer's employment offers.

173. Dignidad also says that some of the employees were entitled to "overtime" pay which, in this case, would only be paid at regular wage rates for hours worked more than 40 in a week since "farm workers" are not entitled to premium overtime pay under section 40 of the *ESA*. The delegate did not address this issue in his reasons even though the BC Fed complaint (but not the Dignidad complaint) expressly advanced a claim for "overtime" pay. Dignidad also appears to be arguing that the Employer contravened section 39 of the *ESA* (working excessive hours) – a provision from which "farm workers" are not excluded. The delegate did not address this provision in his reasons even though it was raised, admittedly rather obliquely, in the Dignidad complaint.

174. With respect to the matter of monetary penalties, as noted above, only one $500 penalty was levied against the Employer. Dignidad says that since the Employer committed "at least a hundred a seventy one violations" [*sic*] of the *ESA*, the Employer "must be charged for all of them". However, in light of section 29(1.1) of the *Regulation* (see above), and as previously noted, it cannot be said that the delegate erred in law in issuing only one penalty in relation to the Employer's section 8 contravention.

175. Dignidad also says that the delegate erred regarding his interpretation and application of section 10 of the *ESA* in relation to its assertion that the employees paid fees to a person in Guatemala in order to secure employment with the Employer. This allegation could equally be characterized as an alleged error of law, or as is discussed, below, perhaps more appropriately as an alleged breach of the principles of natural justice.

Breach of Natural Justice

176. Echoing an argument advanced under the "error of law" ground, Dignidad says that it was never afforded an opportunity to provide evidence to the delegate, or to challenge the Employer's evidence regarding the amount of wages owed to the employees.

177. Similarly, regarding the matter of "hiring fees", Dignidad says that employees paid fees to secure work with the Employer. Dignidad argues that, in effect, there was a breach of the principles of natural justice because "[the Employment Standards Branch] denied TFW/DIGNIDAD the opportunity to participate in the process".

178. In the same vein, Dignidad says that it contacted the delegate and other Employment Standards Branch officials offering to provide additional evidence, but "the Director did not even answer our phone calls, or reply to our emails that could have been the way to share verbally or by writing critical evidences" [*sic*]. Dignidad's submission continues:

> It is true that the director didn't breach the principle of natural justice by choosing the evidence from our opponent, but what is not fair is that the director didn't consider that we can provide evidences to strengthen his Determination and to show that even in the evidence that [the Employer] showed are at least inaccurate. Even more, not analyzing that evidence and accepting them as valid is definitely a breach of natural justice… [*sic*]
>
> Dignidad wasn't only denied the opportunity to present additional evidences, but also Dignidad didn't have the chance to know the arguments of the opponent. For example we didn't know

> about the initial finding letter that Director sent to [the Employer], or the whole answer [the Employer] gave to the Director related to our complaint…[*sic*]

New Evidence

179. The "new evidence" that Dignidad wishes to submit in this appeal is not evidence that was, as is required by section 112(1)(c) of the *ESA*, "unavailable" when the Determination was being made. The evidence, broadly speaking, consists of various employee records relating to their hours worked and Dignidad says that "we had no opportunity to present this evidences, because the Director failed to give us the chance to know or hear the evidences of our opponent and reply to him" [*sic*]. In my view, it is more appropriate to consider this ground of appeal within the "natural justice" ground of appeal.

THE DIRECTOR'S AND EMPLOYER'S RESPONSES TO DIGNIDAD'S APPEAL

The Director's Response

180. The Director, while noting that the Determination was sent to both Dignidad and the BC Fed, nonetheless concedes that during the course of the delegate's investigation, the employees (as well as Dignidad and the BC Fed) were not provided with the payroll records produced by the Employer pursuant to a section 85 Demand, or with the results of the Employer's self-audit, or the delegate's February 15, 2019 preliminary findings letter.

181. With respect to the specific grounds of appeal raised, the Director submits that Dignidad's "error of law" ground of appeal is essentially an assertion of a breach of the principles of natural justice. And in this latter regard, the Director says:

> With respect to the nine individual complainants whom DIGNIDAD represents in this appeal, the Director concedes that there was a failure to observe the principles of natural justice. The Delegate failed to provide these complainants with disclosure of the payroll records and self audit performed by the [Employer] and the Delegate did not provide these complainants with a copy of the preliminary findings letter and an opportunity to make submissions and provide evidence.
>
> With respect to the remaining 43 [employees], the Director submits that DIGNIDAD is not entitled to maintain an appeal on their behalf because they were not named in the Determination and they were not served with a copy of the Determination. Further, no application has been made to the Tribunal by the remaining 43 [employees] for standing as a party to the appeal.

[Note: Dignidad now represents 52 employees, of which only 9 were named in the original Dignidad complaint]

182. Section 81(1), discussed above in the context of Dignidad's application to extend the appeal period, states that "any person named in the determination" must be served with a copy of it. Section 112(1) states that "a person served with a determination" may appeal it. The Determination is an unpaid wage award in favour of the 185 individual employees listed in Appendix A to the Determination ("Names of Complainants"). These employees' individual unpaid wage entitlements are listed in Appendix B ("Wage Calculation Summary"). Although all 185 employees are described in Appendix A as "complainants", in fact, there were only 12

individual employees identified in the Dignidad complaint. The BC Fed complaint referred to 170 employees, but there is nothing in the record to indicate that their individual identities were ever provided to the Director. Nonetheless, the Director was empowered under section 76(2) of the *ESA* to consider the unpaid wage claims of the employees who did not formally file complaints: "The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint."

183. The Director says that "'any person named in a determination' does not mean witnesses named in the determination and it does not mean employees whose identities have been ascertained as a result of the Director's investigation pursuant to s. 76(2)" (my underlining). I would note that none of the employees named in the Determination was a "witness" (the delegate never interviewed any of the employees as part of his investigation). Further, none was simply an employee whose identity was merely "ascertained" – the employees identified in Appendix A were all employees who had not been paid the wages to which they were entitled under their employment contracts, and who were awarded wages under the Determination. Nevertheless, the Director says that merely being awarded wages by way of the Determination "does not create appeal rights for those listed employees".

184. The Director's position regarding the "new evidence" ground of appeal is that any evidence offered by any of the 43 employees who were not named in the original Dignidad complaint cannot be considered, since none of them has "standing to appeal the Determination". As for the evidence tendered by the other 9 employees, the Director concedes that there was failure to observe the principles of natural justice regarding these employees and, accordingly, "the matter should be referred back to the Director to remedy the failure and report back to the Tribunal".

185. As for the appropriate order, the Director says that the appeal should be dismissed as it relates to 43 of the employees who are now appellants before the Tribunal. The Director requests that the Tribunal issue the following order: "That the matter is referred back to the Director to provide the twelve individuals who were complainants before the Director with an opportunity to present evidence and provide additional submissions and report back to the Tribunal."

The Employer's Response

186. Much of the Employer's submission in these appeals simply reiterates the position it has advanced in its own appeal of the Determination.

187. As noted above, the Director concedes that there was a breach of natural justice regarding 12 of the employees, and that there should be a "referral back" order so that these employees can "make submissions and provide evidence". The Employer submits that the Director's proposed order "should not be accepted" as "[i]t is not a fair procedure". The Employer's first position is that the Tribunal should not adjudicate the employees' unpaid wage entitlements, and it further says that "the Director's suggested procedure would amount to a breach of the [Employer's] procedural fairness rights [and that the Employer] should be entitled to respond to any new evidence presented by the complainants". The Employer maintains that "any procedure short of an oral hearing will result in a denial of a fair hearing". The Employer maintains that Dignidad's submissions regarding the employees' unpaid wage entitlements is not based on credible and cogent evidence, and that "[i]t is nonsensical to expect the [Employer] to provide submissions about damages when the Appellants provide no evidence".

188. I believe that, at least to a degree, the Employer's submissions reflect a misunderstanding about the "referral back" process typically ordered by the Tribunal. In cases such as this, where there is contested evidence about the actual wage entitlement of the employees, the Tribunal would not simply allow the Director to hear from one party without also hearing from the other. Thus, if a referral back order is issued in this matter, the Employer would be given the right to fully participate in that process. The Employer's expressed concerns about the quality of the evidence submitted by Dignidad in these appeals misses the point that the Tribunal is not a factfinding body of first instance.

189. With respect to the matter of natural justice, and the adequacy of delegate's investigation, the Employer appears to heartily endorse Dignidad's position. The Employer says that the delegate's investigation "was significantly flawed". But despite that assertion, the Employer's first position is that the Determination "should be quashed or cancelled on the basis that there is no liability". Alternatively, the Employer requests a referral back order "with clear directions that the Director proceed by way of an oral hearing", or that "the Tribunal should, itself, hold an oral hearing to determine all of the issues".

190. With respect to Dignidad's "new evidence", in its May 20, 2020 submission, the Employer asserts that some of it was "not before the Branch and should not be admitted on an appeal". No doubt this is an accurate statement since none of the employees was interviewed during the delegate's investigation, nor was any attempt made to obtain the employees' evidence. The Employer also asserts some of this "new evidence" is admissible because purported translations have not been authenticated and other documents are inadmissible by reason of section 235 of the *Workers Compensation Act*. In summary, the Employer says: "If the Tribunal is considering admitting the new documents, the Employer requests an opportunity to make submissions with respect to their admissibility and other matters."

DIGNIDAD'S APPEAL – FINDINGS AND ANALYSIS

The Minimum Period of Employment

191. Dignidad says that the delegate erred in rejecting its contention that the employees were entitled to not less than 6 months of paid employment. In the absence of any direct evidence from the employees, the delegate turned to the provisions of the employment contract – and, in particular clauses 1.1, 5.3, 9.1, and 10.1 – and concluded: "I am not persuaded…that the TFW's are entitled to six months wages" [*sic*]. Clause 1.1 (reproduced above) specifically states that the employees' contracts shall continue for 6 months from the date when the employee commences working at the farm. However, clause 10.1 gives the Employer the unilateral right to terminate the employee's services on 1 week's written notice, and notice is only required if employee has "completed three months of uninterrupted service" (essentially codifying the *ESA* provision regarding the payment of section 63 compensation for length of service). This provision certainly undermines the argument that the employees were guaranteed 6 months' employment.

192. Further, although Dignidad maintains that the employees were promised not less than 6 months of paid employment, at other points in its written submissions, it says that "[s]everal pieces of evidence provided…show that it was a clear commitment that [the Employer] will provide *4-6 months of work*" [my *italics*].

[193.] Perhaps the most that can be said about the employees' contracts is that they took the form of a 6-month fixed-term agreement with an early "without cause" termination provision. There is nothing in the agreement that expressly guarantees the employee 6 months of paid employment, or that provides for payment of wages to the end of the 6-month term if the Employer unilaterally terminates the contract during its term.

[194.] On balance, I am not persuaded that the delegate made a palpable and overriding error regarding this issue of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) when he determined that the contract, considered in its entirety, constituted a promise by the Employer to provide not less than 6 months' paid employment.

Section 10 Hiring Fees

[195.] Section 10(1) of the *ESA* states:

> A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
>
> (a) employing or obtaining employment for the person seeking employment, or
>
> (b) providing information about employers seeking employees.

[196.] In the Dignidad, but not the BC Fed, complaint it was alleged that the employees paid fees ranging from $2,000 to $3,000 "to obtain employment with [the Employer]" and that "[t]his is in violation of the Employment Standards Act." The delegate held there was insufficient evidence before him demonstrating that the Employer contravened section 10. In light of the very scant evidence before the delegate regarding this matter, and even considering the additional evidence Dignidad submitted on appeal, I am unable to conclude that the delegate erred in rejecting the section 10 claim. I wish to stress, however, that I am not making any finding about whether hiring fees were collected by some person in Guatemala. I am merely finding that even if this occurred – and the evidence on this point is not particularly probative – there was no cogent evidence presented in the Dignidad complaint that the *Employer* contravened section 10.

Natural Justice – Failure to Adjudicate Certain Issues Raised in the Complaint

[197.] The delegate required the Employer to provide certain payroll records, perform a "self-audit", and make submissions with respect to the matter of unpaid wages owed to the employees named in the payroll records. However, the delegate never gave the complainants (through their agents, Dignidad and the BC Fed) an opportunity to review these records, or to make submissions regarding the accuracy of the Employer's records, and its unpaid wage calculations/submissions.

[198.] The Dignidad complaint specifically claimed that at least some of the employees: i) were paid on a "piece rate" basis rather than at the agreed hourly wage; ii) were not paid for all hours worked, contrary to their employment contracts; iii) had medical insurance premiums wrongfully deducted from their pay (if true, a presumptive contravention of section 21 of the *ESA*); iv) were subjected to improper income tax deductions (a presumptive contravention of section 22 of the *ESA*); and v) more generally, had been

subjected to improper retaliation for asserting their rights under their contracts and/or the *ESA* (a presumptive contravention of section 83). I am not finding that any or all of these claims are meritorious. However, by restricting the investigation to whether there was a weekly wage guarantee, and by limiting the investigative process to communications to and from the Employer, the delegate appears to have summarily dismissed the other elements of the employees' complaints without hearing from either them, or their representatives. In my view, these claims should have been addressed in the delegate's reasons, and he erred in law and breached the principles of natural justice when he failed to do so. Although the delegate did refer to the employees' claims regarding improper wage deductions (see delegate's reasons, page R8), he never formally adjudicated this allegation. This latter matter was properly before the delegate and, in my view, he should have addressed this claim in his reasons.

199. Section 77 of the *ESA* states that the Director of Employment Standards (and, by extension, his delegates) must give a person under investigation (such as the Employer in this case) "an opportunity to respond" to the allegations and evidence that precipitated, or that is uncovered during, the investigation. Although section 77 does not mandate an equivalent obligation toward complainants, in my view, fundamental fairness principles dictate that complainants, or their representatives, should be given an opportunity to reply to evidence that has been submitted by the employer during the course of an investigation, especially when that evidence and argument stands in marked contrast to the complainants' position**.**

200. The delegate did address the employees' claim that they were guaranteed 6 months of employment, and the claim to recover hiring fees allegedly paid in contravention of section 10. As noted above, I agree that these two claims were properly rejected. The delegate also, properly in my view, refused to adjudicate various other claims relating to bullying, harassment, unsafe working conditions, and sub-standard housing as not falling within the ambit of the *ESA*.

The "Make Whole" Remedy

201. The delegate concluded that the Employer failed to pay the employees in accordance with clause 3.1 of their employment contracts, and that it made a section 8 false representation regarding the amount of paid work that would be made available to the employees for each week of their employment. Having found a section 8 contravention, the delegate then purported to issue a so-called "make whole" order under section 79(2). This latter provision states:

> In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

202. The delegate, at page R18 of his reasons, and after quoting section 79(2), stated:

> The remedy for contravening [section 8] is a "make whole" remedy, which means the employer will be required to compensate the employee in such a way as to put him or her back in the same position as if the contravention had not occurred…
>
> …The make whole approach in this case consists of providing TFW's wages for 40 hours per week for the period in question.

203. Section 79(2) empowers the Director to issue a remedy that extends beyond simply ordering the recovery of unpaid wages payable under an employment contract. The delegate should have turned his mind to the other remedial aspects of section 79(2) and, in my view, he erred in failing to do so. Had the delegate communicated with the complainants, or their representative, he may well have uncovered evidence of other claims that could be the subject of a section 79(2) remedial order. I do not wish to be taken as finding that the employees are entitled to other avenues for recovery (e.g., recovery of out of pocket expenses), only that the delegate should have turned his mind to that possibility. These possible remedies may be addressed if the Director ultimately determines, after hearing from all parties, that there was a section 8 contravention.

Breach of Natural Justice – Who is Entitled to a Remedy?

204. The Director now concedes that there was a breach of the principles of natural justice when the delegate failed to hear from the employees regarding the results of the Employer's "self-audit". However, I am of the view that the natural breach extends further, and that it was also a breach of the principles of natural justice for the delegate to fail to investigate the specific alleged *ESA* contraventions that were raised in the Dignidad complaint.

205. Although the Director concedes that there was, at least with respect to the matter of the Employer's self-audit, a breach of the principles of natural justice, the Director also says that this breach can only be remedied in favour of the original 12 complainants identified in the Dignidad complaint. I do not agree.

206. I accept the Director's submission that a person identified only as a "witness" in a determination (or, more correctly, in reasons issued concurrently with a determination) does not have a statutory right to appeal that determination. But I am unable to accept the notion that an employee who is awarded wages under a determination is not a "person named in the determination" for purposes of section 81. By any reasonable interpretation of this latter phrase, used in its grammatical and ordinary sense in light of the scheme of the *ESA* (see *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), all of the employees listed in Appendices A and B of the Determination were persons "named" in it. While it might be said that a "witness" is also a person "named" in a determination, that person does not have any direct pecuniary interest in the outcome of a dispute before the Director and, as such, it cannot be said that any of the statutory grounds of appeal are relevant to such a person.

207. For ease of reference, sections 81(1), 112(1), and 122(1) and (2) of the *ESA* are set out, below:

> 81 (1) On making a determination under this Act, <u>the director must serve any person named in the determination</u> with a copy of the determination that includes the following…
>
> 112 (1) Subject to this section, <u>a person served with a determination</u> may appeal the determination to the tribunal on one or more of the following grounds…

122 (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if

(a) served on the person, or

(b) sent by registered mail to the person's last known address.

(2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

[my underlining]

208. The Director argues that a "non-complainant" employee who is awarded wages under a determination is not a "person named in a determination" under section 81. That being the case, the Director says that such an employee does not have any section 112 appeal rights. The Director has not provided any authority to support that proposition and, so far as I can determine, the Tribunal has never addressed this question.

209. In my view, section 81 must be interpreted in light of the section 2 purposes of the *ESA* which include ensuring that employees are paid in accordance with the *ESA*, are treated fairly, and that dispute resolution procedures under the *ESA* are fair and efficient (see sections 2(a), (b), and (d) of the *ESA*). These statutory purposes do not speak to the interests of witnesses, but certainly do speak to the interests of employees who are enmeshed in an unpaid wage dispute.

210. Consider a scenario where, say, a dozen employees filed unpaid wage complaints regarding the same employer. The resulting determination awarded unpaid wages to 11 of these complainants, as well as to several other employees who did not file complaints (but who were identified during the investigation as a result of a payroll audit). However, the Director inadvertently failed to address the twelfth complainant's claim in the determination. Although not "named in the determination" (and, accordingly, never served), would that complainant be properly denied a right to appeal? Of course, that complainant could also query the delegate about why their complaint was not addressed, but given the strict time limits governing appeals, would it be fair to deny that person a right of appeal (which, in turn, might result in the Tribunal issuing a section 114(2) order)? If the other employees who were awarded wages under the determination considered their unpaid wage award to be incorrect, would it be fair to deny them appeal rights under the *ESA* (regardless of whether they were personally served with the determination)? What about the situation of a complainant who is awarded (or denied) wages by way of a determination, but was never served with it? Is it fair to deny that person a right of appeal simply because they were never personally served?

211. In my view, *any person* who is awarded or denied wages under a determination, or whose rights, entitlements, or obligations are otherwise determined under the *ES*A, is a person "named in a determination" within section 81.

212. I would also hold that where, as a result of the Director's investigation, employers or other persons held liable under a determination, but not originally identified in a formal section 74 complaint (perhaps because these employers were named as a result of a section 95 "common employer" or section 97 "successorship" declaration), are equally entitled to be characterized as a "person named in the determination" for purposes of section 81. In my view, whether a person is "named" in a determination for purposes of section 81 does

not turn on whether that person was either an original complainant, or the subject of an original complaint. The key question is whether that person's rights and/or obligations under the *ESA* are addressed in a determination.

213. Thus, complainants, as well as those employees whose claims are addressed in a determination, are "persons named" in the determination for purposes of section 81. Similarly, employers or other persons who were either specifically named in a complaint, or that were later identified during the course of an investigation (for example, as a "common employer"), and then held liable under a determination, are also "persons named" for purposes of section 81.

214. A "person named" in a determination *must* be served with a copy of it. In my view, such a "named person's" appeal rights should not turn on whether the Director complied with its service obligations under section 81. In this instance, all of the employees identified in Appendices A and B of the Determination were "persons named in the determination" and, as such, should have been served with a copy of it. I recognize that the Director may well have not been able to personally serve many, probably most, of these employees. This sort of situation is precisely why section 122(1)(b) provides that service may be effected by sending the determination "by registered mail to the person's last known address", thereby triggering the section 122(2) "deemed service" provision.

215. Read literally, a person who was held liable under a determination, but who the Director failed to serve contrary to section 81, would nonetheless seemingly be denied a right to appeal, because only "a person *served* with a determination may appeal the determination to the tribunal". In my view, such a situation is absurd, and statutory provisions must be interpreted so as to avoid absurdities (see, for example, *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] 2 S.C.R. 289).

216. I interpret section 112(1) to mean that any person "named" in a determination (in the sense that their rights, entitlements or obligations under the *ESA* were adjudicated under that determination), and who either was, *or should have been*, served with the determination, is a "person served with a determination" for purposes of section 112(1) of the *ESA*.

217. It follows I reject the Director's position that, notwithstanding the delegate's failure to comply with the principles of natural justice, only the 12 individuals identified in the original Dignidad complaint are entitled to have their unpaid wage claims revisited through a fresh process.

218. Dignidad has invited me to consider a great deal of evidence it has submitted on appeal, arguing that it supports the employees' claimed *ESA* entitlements. I do not believe it appropriate for the Tribunal, as an appeal body, to conduct any sort of evidentiary hearing regarding the employees' unpaid wage claims. I therefore reject Dignidad's and the Employer's separate invitations to, as the Employer put it, have the Tribunal, "hold an oral hearing to determine all of the issues". I am also not persuaded that this is an appropriate case for the Tribunal to simply refer the matter back to Director for purposes of conducting further inquiries and then report back to the Tribunal.

219. While I am very much alive to the significant practical problems associated with a substantial "do over", in my view, the Determination must, at least with respect to several key matters, be cancelled. The Director must consider afresh those matters raised in the Dignidad complaint that are within the Director's statutory

authority and that have not yet been adjudicated. However, there is no need to conduct an entirely new process (either by way of an investigation or an evidentiary hearing), regarding the matters that have been correctly determined, such as the delegate's interpretation and application of clause 3.1 of the employees' employment contracts, the delegate's finding that the employees were not guaranteed 6 months' employment, and his finding regarding section 10 of the *ESA*. Accordingly, the Dignidad appeal is allowed in part, and dismissed in part.

SUMMARY OF FINDINDS REGARDING THE DIGNIDAD APPEAL

220. All of the employees awarded wages under the Determination should have been served with a copy of it and, regardless of whether they were actually served with a copy of it, each employee was entitled to appeal the Determination.

221. The delegate correctly determined that the employees were not guaranteed at least six months of paid employment, and that the Employer did not contravene section 10 of the *ESA*.

222. Dignidad's arguments concerning whether the Employer contravened sections 32, 34, 63, or 64, advanced for the first time on appeal, are not properly before the Tribunal.

223. Neither the Director nor the Tribunal has the statutory authority to adjudicate matters that are based on alleged contraventions of the *Human Rights Co*de or the *Workers Compensation Act*.

224. The delegate erred in law and failed to observe the principles of natural justice by failing to investigate and adjudicate all of the issues within the jurisdiction of the Director of Employment Standards that were advanced in the Dignidad complaint.

225. The delegate failed to observe the principles of natural justice by failing to afford Dignidad and the affected employees a reasonable opportunity to fully and meaningfully participate in the investigation that preceded the issuance of the Determination.

ORDERS

226. Dignidad's application to extend the appeal period is granted. Pursuant to section 109(1)(b) of the *ESA*, the appeal period applicable to all of the 52 appellant employees is extended to July 12, 2019.

227. Pursuant to section 115(1)(a) of the *ESA*, and in relation to the Employer's appeal, I confirm the Determination with respect to the delegate's interpretation of clause 3.1 of the employees' employment contracts.

228. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination with respect to the following matters that arise from the Dignidad appeal:

- the delegate's finding that the employees' contracts did not guarantee them at least 6 months of paid employment;
- the delegate's finding that the Employer did not contravene section 10 of the *ESA*; and

- the unpaid wage orders made in favour of the 133 employees who have not appealed the Determination.

229. Pursuant to section 115(1)(a) of the *ESA*, the balance of the Determination is cancelled.

230. Pursuant to section 115(1)(b) of the *ESA*, I am referring the claims of the 52 employees who appealed the Determination back to the Director. I am not issuing any directions regarding how the Director shall proceed. The Director has the discretionary authority to either conduct a new investigation, or to hold an oral evidentiary hearing. The Director must not restrict the scope of any new investigation or hearing solely to the rights and entitlements of the 12 employees originally identified in the Dignidad complaint. Any new investigation or hearing shall, at a minimum, allow for a consideration of the rights and entitlements under the *ESA* of the 52 employees represented by Dignidad in the Dignidad appeal.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Appendix A: Respondents to the Employer's Appeal

Self -represented employees

Ilmer Alexander Asencio Escobar
Ingrid Violeta Barillas Coxaj

Employees represented by Dignidad (sorted alphabetically by first name)

Alex Arnoldo Estrada Escobar
Angela Mercedes Noj-Patricio
Arceli Lopez Jaco
Blanca Iris Garcia Lopez
Celeste Noemi Siquinajay Juarez
Celia Marina Argujo Alejandro
Damaris Lily Mauricio De Ovalle
Delmy Alejandra Alonzo Moreno
Deysi Corina Martinez Bernal
Dinora Patricia Aquino Garcia
Edi Maristed Ramirez Salazar De P
Elida Carmencita Xetey Loch
Elida Luz Salazar y Salazar
Eliezer Manuel Flores Espina
Elsa Maely Lima Revolorio
Eufemia Adelaida Baten-Ramos
Fredi Orlando Valdez-Ramirez
Gilber Donain Estrada Mazariegos
Gladis Odilia Perobal Mutzutz
Gladys Veronica Cuca Padre
Glenda Yaneth Lima Revolorio
Glendy Catarina Lopez Hernandez
Glendy Mux-Corona
Gloria Maribel Suy-Hernandez
Gricelda Azucena Sandoval Calderon
Herminia Veronica Gamboa Cesareo
Iris Yaneth Vela Leiva
Jenifer Susana Medrano Molina
Jessica Celeste Castillo Jorquin
Jorge Mario Flores Mazariegos
Jose Aroldo Diaz-Ramos
Juana Edilberta Rodriguez Pinzon
Magda Yanet Perez Osorio
Maria Amalia Itzol Chicop
Maria Arminda Lopez Arreaga De Lem
Maria Candelaria Sequen-Tezen
Maria Carmen Saz-Yucute
Maria Cristina Sutuj Solano
Maria Luisa Cobox Cutzal
Maria Luz Cruz Reyes
Mario Alfredo Donado Castro
Mario Josue Corado Marin
Marlin Yohana Lopez Juarez
Milton Erasmo Giron Godoy
Milvia Yesenia Saba Ramirez De Garc
Mirsa Amarilis Martinez Bernal
Nereida Yesseni Guevara Rodriguez De Duque
Nilsia Yahaira Castillo Lima
Norma Anali Sanum Bajan
Nury Maritza Sisimit Yojero
Olga Noj-Patricio
Osmery Haide Arteaga Sagastume
Paula Cecilia Gonzalez Machan
Reina Victoria Balan-Morales
Reyna Esmeralda Tala-Vasquez
Rosa Marina Sanic-Tezaguic De Campa
Sandra Veronica Lopez-Barrera
Sergio Aroldo Barahona Mendoza
Teresa Garcia Pinzon
Wendy Roxana Lorenzana Salazar
Yeison Mersai De Paz

Appendix B: Appellant Employees (appeals filed by Dignidad)

File Number	Appellant
2019/076	Mirsa Amarilis Martinez Bernal
2019/084	Elida Carmencita Xetey Loch
2019/085	Deysi Corina Martinez Bernal
2019/086	Edi Maristed Ramirez Salazar
2019/087	Dinora Patricia Aquino Garcia
2019/088	Marlin Yohana Lopez Juarez
2019/089	Jessica Celeste Castillo Jorquin
2019/090	Nilsia Yahaira Castillo Lima
2019/091	Osmery Haide Arteaga Sagastume
2019/092	Wendy Roxana Lorenzana Salazar
2019/093	Gloria Maribel Suy-Hernandez
2019/094	Nereida Yesseni Guevara Rodriguez De Duque
2019/095	Iris Yaneth Vela Leiva
2019/096	Elida Luz Salazar y Salazar
2019/097	Celia Marina Argujo Alejandro
2019/098	Arceli Lopez Jaco
2019/099	Glendy Mux-Corona
2019/100	Delmy Alejandra Alonzo Moreno
2019/101	Glendy Catarina Lopez Hernandez
2019/102	Eufemia Adelaida Baten-Ramos
2019/103	Maria Candelaria Sequen-Tezen
2019/104	Angela Mercedes Noj-Patricio
2019/105	Sandra Veronica Lopez-Barrera
2019/106	Reina Victoria Balan-Morales
2019/107	Nury Maritza Sisimit Yojero
2019/108	Gladys Veronica Cuca Padre

File Number	Appellant
2019/109	Paula Cecilia Gonzalez Machan
2019/110	Maria Cristina Sutuj Solano
2019/111	Herminia Veronica Gamboa Cesareo
2019/112	Olga Noj-Patricio
2019/113	Maria Amalia Itzol Chicop
2019/114	Reyna Esmeralda Tala-Vasquez
2019/115	Maria Carmen Saz-Yucute
2019/116	Gladis Odilia Perobal Mutzutz
2019/117	Rosa Marina Sanic-Tezaguic De Campa
2019/118	Norma Anali Sanum Bajan
2019/119	Elsa Maely Lima Revolorio
2019/120	Glenda Yaneth Lima Revolorio
2019/121	Jenifer Susana Medrano Molina
2019/122	Magda Yanet Perez Osorio
2019/123	Maria Luisa Cobox Cutzal
2019/124	Mario Josue Corado Marin
2019/125	Fredi Orlando Valdez-Ramirez
2019/126	Sergio Aroldo Barahona Mendoza
2019/127	Jose Aroldo Diaz-Ramos
2019/128	Mario Alfredo Donado Castro
2019/129	Jorge Mario Flores Mazariegos
2019/130	Yeison Mersai De Paz
2019/131	Milton Erasmo Giron Godoy
2019/132	Eliezer Manuel Flores Espina
2019/133	Gilber Donain Estrada Mazariegos
2019/134	Alex Aroldo Estrada Escobar