Employment Standards TRIBUNAL

Citation: Jithin Johnson (Re)
2021 BCEST 104

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Jithin Johnson
(the "Employee")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Carol L. Roberts

FILE NO.: 2021/068

DATE OF DECISION: December 23, 2021

DECISION

SUBMISSIONS

Jonathon Braun	counsel for Jithin Johnson
Jordan F. Thorne	counsel for Brink Forest Products Ltd.
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Jithin Johnson (the "Employee") of a June 30, 2021 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. On January 11, 2018, the Employee filed a complaint under the *Employment Standards Act* ("*ESA*") alleging that Brink Forest Products Ltd. (the "Employer") contravened the *ESA* by inducing him to become an employee by misrepresenting the type of work available, by mistreating him due to a complaint or investigation under the *ESA*, by making unauthorized deductions from his wages, and by failing to pay him overtime wages.

3. The Director's delegate (the "delegate") conducted a hearing into the allegations on April 17, 2018. Both parties were represented by counsel.

4. Thirty-eight months following the hearing, the delegate issued a Determination in which he concluded that the Employer had contravened section 8 of the *ESA* in misrepresenting the type of work available. The delegate ordered the Employer to pay wages the Employee would have earned between January 9 and February 14, 2018, the date the Employee found new employment. The delegate determined those wages to be $4,714.36, including accrued interest.

5. The Director also imposed a $500.00 administrative penalty on the Employer for the contravention, for a total amount payable of $5,214.36.

6. The Employee argues that the Director erred in law and failed to observe the principles of natural justice.

7. Section 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found the appeal was appropriate for consideration and sought submissions from the other parties.

8. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the Reasons for the Determination (the "Reasons"), and the submissions of the parties.

ISSUE

9. Whether the Employee has established grounds for interfering with the Director's Determination.

THE DETERMINATION

10. The facts found in the Determination that are relevant to the appeal are as follows.

11. The Employer operates a wood product mill in Prince George, B.C. John Brink ("Mr. Brink") is the sole director and officer of the Employer.

12. On September 29, 2016, Service Canada approved the Employer's application for a Labour Market Impact Assessment ("LMIA") as it met the requirements for a Temporary Foreign Worker Program ("TFWP"). Service Canada informed the Employer that, upon identification of a foreign worker, the Employer would be required to provide the name of the foreign worker and the worker would be required to submit their work permit application prior to the expiry of the LMIA. The LMIA identified Chand & Company Law Corporation ("Chand & Company") as a third party of the Employer.

13. The Employee is an Indian national and has a bachelor's degree in Electrical Engineering and Electronics. In 2016, while working in Dubai, he responded to an advertisement for machine operator positions which had been posted by Gabriel Chand ("Mr. Chand"), who is licensed to practice law in British Columbia, of Chand & Company. The Employee was interviewed by Mr. Chand in Dubai. The Employee's evidence was that Mr. Chand told him that he represented the Employer and that, based on his experience, the Employee would be a suitable candidate for a position in Canada. In March 2016, the Employer offered the Employee a one-year employment contract.

14. The Employee testified that Mr. Chand required that he pay $10,000.00 (US) to Chand & Company representing, in part, fees charged by the government. The Employee paid Mr. Chand $1,685.58 (CDN) on August 2, 2016 and a further $4,000.00 (CDN) on June 3, 2017 prior to leaving Dubai.

15. The Employee testified that he completed the necessary documents, including his work permit application and visa documents himself, and that Mr. Chand only provided the offer letter from the Employer and the LMIA.

16. The Employer paid the Employee's airfare to Prince George. The Employee arrived on July 5, 2017 and was met at the airport by "Costina," who the Employee understood was a representative of the Employer. Costina spoke to the Employee about the outstanding funds he owed Mr. Chand and dropped him off at a house owned by Mr. Brink. The Employee paid Mr. Chand an additional $2,000.00 (CDN) immediately after arriving in Canada.

17. The Employee, along with five or six other employees of the Employer, resided at the house owned by Mr. Brink. The employment contract between the parties specified that no accommodation would be provided to the Employee, but that if it was, it would be at no charge. The Employee paid $350.00 per month rent to Costina for the first two months of his employment, after which he moved to a different house also owned by Mr. Brink, and paid rent directly to Mr. Brink. The Employee paid a total of $2,300.00 in rent during his employment.

18. The Employee did not operate machines at any time during his employment. He was initially placed on the block line, loading wood and grading logs. The Employee testified that he regularly spoke to his supervisor, the mill manager and to Mr. Chand about his concern that he would not be operating machines. At the end of July, Mr. Chand told the Employee that there was no chance he could obtain permanent residency in Canada. The Employee continued to work, hoping that he would eventually be moved into a machine operator position.

19. The Employee worked Monday through Thursday from 6:00 a.m. to 4:30 p.m., with two 15-minute and one 30-minute break. Occasionally, the Employee worked Fridays and Saturdays.

20. The Employee stopped making payments to Mr. Chand after being advised by Prince George Immigrant and Multicultural Services Society that the payments were illegal. The delegate noted the Employee's evidence was that Costina visited him "at all hours of the day and night when [the Employee] was there, pressing him to continue the payments or he would lose his job."

21. On January 2, 2018, Shawn Grattan ("Mr. Grattan"), the Employer's operations manager, gave the Employee a termination letter. The letter gave no reasons for the termination.

22. After receiving the letter, the Employee spoke to Mr. Grattan and to Mr. Chand. Mr. Chand informed the Employee that his employment had been terminated because the Employee had not paid the money he owed to him.

23. The Employee alleged that his employment was terminated because he refused to continue to make payments to Mr. Chand and because he complained about the nature of the work. The Employee also contended that he worked 10 hours per day and was not certain if he had been paid all overtime owed.

24. The Employer's evidence was that all operators started on a block line for about six months to one year as training for the specialized work to be done, and that the Employee's training period had been extended due to his inexperience with woodworking and manufacturing. The Employer's evidence was that while it intended to move the Employee to machine operating, his employment had been terminated due to his poor attitude and performance prior to this occurring.

25. The Employer argued that the Employee had been paid all overtime wages he was entitled to prior to the commencement of the hearing.

26. The Employer contended that the fees charged by Mr. Chand were unrelated to the Employer's hiring process. The Employer's evidence was that it paid foreign workers premium rates because of the challenges of finding workers with machine experience, and it "employed" individuals like Mr. Chand to assist with finding foreign workers. The Employer denied that it employed Mr. Chand as its lawyer. The Employer's evidence was that Mr. Chand never made any payments to the Employer for any purpose and that Mr. Chand was not authorized to hire employees on its behalf.

27. The Employer contended that Mr. Chand was responsible for securing the Employee's visa and work permit, and that any financial arrangements were between Mr. Chand and his clients. The Employer also contended that while it paid fees to the Government of Canada for LMIAs, Temporary Foreign Workers ("TFWs") were never charged for these costs. Mr. Brink testified that he was unaware of the disagreement

between Mr. Chand and the Employee, and that he would not terminate an employee because of a disagreement over the payment of fees.

28. Mr. Brink owned several homes near the mill that he rented to his employees at minimal rates. His evidence was that the Employee was not required to live in one of his houses, and that the employment contract did not require the Employer to provide the Employee with housing.

29. Mr. Grattan's evidence was that although he signed the LMIA acknowledging that the Employer was responsible for the actions of third-party recruiters, the Employer did not provide advertisements for Mr. Chand's use. According to the Determination:

> Mr. Grattan acknowledged that Mr. Chand was listed as a third party on the LMIA documents, but it is unclear why as [the Employer] did not engage Mr. Chand's services as a recruiter.

30. Mr. Grattan's evidence was that Mr. Chand presented him with the Employee's resume, but that the Employer did not receive any payments from Mr. Chand. He also testified that the Employer bore all costs associated with bringing TFWs to Prince George for work. Mr. Grattan's evidence was that he offered the Employee a one-year employment contract after reviewing the Employee's resume with Mr. Brink.

31. Mr. Grattan testified that although the Employee was hired as a machine operator, he started on the block line as a normal part of the Employer's training for all operators. Mr. Grattan said that he expected the Employee to progress quickly to machine operating after his training, but because the Employee complained about back issues he was assigned to grading blocks, which did not involve loading or unloading wood. Mr. Grattan's evidence was that the Employee did not progress as quickly as he had hoped, but that in December, the Employer determined that he was ready to begin moving to training in machine operations. Mr. Grattan said that he did not speak to the Employee about paying Mr. Chand's bills and that Mr. Chand did not speak to him about terminating the Employee.

32. Mr. Grattan testified that the Employer determined that it would not renew the Employee's contract and began looking for new employees to fill the LMIA. He said that he terminated the Employee's employment on January 2, 2018, with one week notice, pursuant to the employment contract. He testified that the Employee was "a bad fit" for the Employer, causing disruption at the mill because he was unhappy at his job. Approximately one week following his termination, the Employee asked Mr. Grattan to repay to the Employee the fees the Employee had paid to Mr. Chand.

33. In February 2018, the Employer made a payment to the Employee for unpaid overtime wages.

Director's Findings

Timeliness

34. Although the delegate determined that the complaint was not filed within the time limit prescribed in section 74(4) of the *ESA*, after considering the length of the delay and the reasons for it, the delegate decided to exercise his discretion in favour of the Employee and to continue adjudicating the complaint. There is no appeal against the Director's exercise of discretion to investigate the complaint.

Fees paid to Mr. Chand

35. The delegate determined that the fees Mr. Chand charged to the Employee were not for a prohibited activity. The delegate found that the fees paid by the Employee to Mr. Chand were for Mr. Chand's services as an immigration consultant, not for providing information about the Employer's job openings. The delegate noted that the *ESA* did not prohibit immigration consultants from charging fees for immigration services, nor did it regulate the fees charged. The delegate concluded that Mr. Chand's fees were not prohibited under section 10 of the *ESA*, and that it was not necessary for him to decide if Mr. Chand was acting as the Employer's agent or if the Employer was responsible for charging the fees.

Misrepresentation of the type of work

36. The delegate found that the Employer represented to the Employee that he would be operating machines after a period of training in the mill's specific operations, and that by placing him on the block line for six months, the Employer misrepresented the type of work available and contravened section 8 of the *ESA.*

37. The delegate noted that, if an employer contravened section 8, the remedy may include paying an employee any wages lost as a result of the contravention as well as any out-of-pocket expenses incurred as a result. The delegate noted Mr. Grattan's evidence that the Employee's employment had been terminated because of his "poor fit" with the Employer and because he was causing a "disturbance" at the mill. The delegate found that the Employee was indeed dissatisfied with his work because, in large part, he had hoped to obtain a position matching his skills and that he was vocal about this dissatisfaction. The delegate found that the Employee:

> ..most likely would not have had cause to be dissatisfied with his job at [the Employer] had he been provided with the work he was promised, and that his termination was a result of [the Employer's] misrepresentation of the type of work available.

38. The delegate determined that, had the Employer not misrepresented the type of work available, the Employee would most likely have completed his term of employment with the Employer. Taking into consideration the evidence that the Employee obtained a new work permit and began working again five weeks after the Employer terminated his employment, the delegate ordered the Employer to pay the Employee the wages he would have earned between January 9 and February 14, 2018. This finding has not been appealed.

Overtime wages

39. The delegate concluded that there was insufficient evidence to determine when the Employee worked outside of his normal schedule, if at all. The delegate found that the Employee had been paid all overtime he was entitled to. This finding has also not been appealed.

Unauthorized Deduction of Wages

40. The delegate noted that the employment agreement indicated that the Employer would not provide housing for the Employee, but that "[a] separate clause, which was not selected on the form contract, indicated that if housing was provided by [the Employer] it would be at no cost." The delegate found that

there was no dispute that Mr. Brink, the Employer's owner and sole director, provided housing for $350.00 per month. The delegate also noted there was no evidence of any tenancy agreement.

41. The delegate found that:

> …there was nothing prohibiting Mr. Brink from personally providing housing to [the Employee] in return for rent payments. Mr. Brink's uncontested evidence was that [the Employee] was not required to rent from him, and could have secured his own housing had he chosen to do so.

42. The delegate determined that the Employer did not directly or indirectly make a deduction from the Employee's wages with respect to his rent payments.

Termination because of a complaint

43. The delegate noted that he had determined that the Employee was entitled to a remedy under section 79(4) of the *ESA* for the Employer's contravention of section 8, and that any remedy for a contravention of section 83 would be identical to that he had already made for the section 8 contravention. The delegate nevertheless considered whether or not the Employer had contravened section 83 of the *ESA* by terminating the Employee because he had made a complaint.

44. The delegate noted the Employee's assertions that he was terminated because he refused to make further payments to Mr. Chand. The delegate found, on the evidence, that this allegation had not been established. The delegate considered the Employer's evidence that it had no knowledge of the dispute between Mr. Chand and Mr. Johnson, and that, in any event, Mr. Chand had no authority or influence over the Employer's decisions to hire or fire employees. The delegate concluded, on a balance of probabilities, that the Employee was not terminated because of the fee dispute. The delegate further found no evidence the Employee had contemplated filing a complaint prior to the Employer terminating his employment; indeed, he testified that he would not complain to any government agencies given his dependence on the Employer for work. The delegate concluded that the Employer had not contravened section 83 of the *ESA*.

ARGUMENT AND ANALYSIS

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

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

46. The Employee argues that the Director erred in law and failed to observe the principles of natural justice in finding that the Employer did not charge a fee for hiring him contrary to section 10 of the *ESA*, and in determining that the Employer did not directly or indirectly make deductions from his wages by charging him rent, contrary to section 21 of the *ESA*.

47. The Employee also submits that the Director failed to observe the principles of natural justice in failing to issue the Determination for more than three years following the date of the hearing.

Error of Law

48. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam*), [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

Did the Director err in finding that the Employer did not charge the Employee a fee for hiring him?

49. Section 10 of the *ESA* prohibits a person from requesting, charging or receiving, directly or indirectly, a payment from a person seeking employment, for obtaining employment for the person seeking employment, or for providing information about employers seeking employees. Payments so received are deemed to be wages owing.

50. The Employee argues that the Director acted on a view of the facts which could not be reasonably entertained and failed to consider all the evidence in concluding that Mr. Chand charged the Employee fees only for immigration services, not for providing information about the Employer's job openings.

51. The delegate submits that his finding that it was more likely than not that the Employee paid Mr. Chand for immigration services and not for job placement was based on the best evidence available, that being the contemporary communications between Mr. Chand and the Employee. The delegate further submits that, "while it may have been reasonable for an alternate finding to be reached on this point, findings of fact which are grounded in the evidence are not open to review" on appeal.

52. The Employer contends that the Employee's appeal is based on factual findings and submits that an appellant cannot appeal factual findings or findings of mixed fact and law. The Employer argues that the appeal can only succeed if the Tribunal determines that no reasonable person acting judicially could come to the same determination. The Employer submits that the delegate's Determination was both reasonable and supported by the evidence.

53. The evidence before the delegate was that the Employee responded to an advertisement for employment with the Employer placed by Mr. Chand. Mr. Chand, not the Employer, interviewed the Employee. Although the delegate wrote (Reasons, R 3) that the Employee was interviewed by the Employer, there is nothing in the record that suggests that was the case. Further, the Employer's evidence was that Mr.

Chand brought the Employee's resume to Mr. Grattan and that Mr. Grattan offered the Employee a position after reviewing the resume with Mr. Brink. (Reasons, R 6).

54. The delegate's discussion of the evidence is somewhat confusing. In recounting Mr. Brink's evidence, the delegate wrote as follows (Reasons, R 6):

> [The Employer] employs individuals like Mr. Chand to assist with finding candidates internationally. Mr. Brink knew Mr. Chand for about four or five years. Mr. Chand specialises in immigration law and TFW recruitment. [The Employer] has never employed Mr. Chand as a lawyer. Mr. Chand has never made any payment to [the Employer] for any purpose, and has no hiring authority for [the Employer]. Any fees charged by Mr. Chand are between Mr. Chand and his clients. [The Employer] was not involved with [the Employee's] visa or work permit process…

55. It is difficult to understand the details of the arrangement between the Employer and Mr. Chand. The Employer appeared to assert that it "employed" Mr. Chand as a recruiter despite the fact that Mr. Chand is an immigration lawyer and the job advertisement indicated that interested parties were to respond to Chand & Company. Additionally, the LMIA issued to the Employer was copied to Mr. Chand.

56. At page R 6 of the Reasons, the delegate noted as follows:

> As part of the LMIA application process, Mr. Grattan signed LMIAs, including acknowledging that [the Employer] was responsible for the actions of third party recruiters. Mr. Grattan acknowledged that Mr. Chand was listed as a third party on the LMIA documents, but it is unclear why as [the Employer] did not engage Mr. Chand's services as a recruiter.

57. Although the last sentence is confusing, I understand the delegate to be saying that he was not clear why the Employer did not engage Mr. Chand as a recruiter. That appears to conflict with Mr. Brink's evidence that the Employer had engaged Mr. Chand as a recruiter.

58. Mr. Chand did not give evidence at the hearing. However, the Employee submitted an audio recording of a telephone call with Mr. Chand in which Mr. Chand told him that his employment was being terminated because he had not paid the full amount of Mr. Chand's fees. In the recording Mr. Chand told the Employee "Come up with my money . . . and I will talk to Shawn." He further told the Employee "Just so you know, I caused this. Because you didn't pay, this is what happened to you."

59. The Record shows that the documentary evidence before the delegate consisted of a copy of the job advertisement placed by Mr. Chand indicating that Mr. Chand was recruiting people for work in Canada, the LMIA, which was provided to the Employee by Mr. Chand and which indicated that Mr. Chand was a third party for the Employer, electronic funds transfers made by the Employee to Mr. Chand and a letter from Mr. Chand to the Canadian embassy in Abu Dhabi stating that he was the Employee's representative.

60. The delegate made no attempt to reconcile the Employer's evidence with the Employee's evidence that Mr. Chand told him that he was paying to secure a job with the Employer and that the Employee was pressured by Costina to pay Mr. Chand's fees. Although the delegate made no assessment of the credibility of the witnesses, there was nothing to indicate that he found the Employee not credible.

61. The telephone conversation between Mr. Chand and the Employee is strongly suggestive of an arrangement between Mr. Chand and the Employer and corroborates the Employee's evidence. In addition, the delegate made no attempt to discern why the Employer's representative "Costina" would speak to the Employee about paying Mr. Chand's fees if indeed, as Mr. Brink testified, fees charged by Mr. Chand were between Mr. Chand and his clients.

62. I find that, in concluding that the fees paid by the Employee to Mr. Chand were related to Mr. Chand's immigration services rather than for obtaining employment for the Employee, or for providing information about the Employer, the delegate acted on a view of the facts that cannot be reasonably entertained.

63. Even if some of Mr. Chand's fees were, in part, for immigration services, the evidence supports a conclusion that at least some of the fees were recruiting fees and that Mr. Chand acted as the Employer's agent.

64. I refer this aspect of the Determination back to the Director for a reconsideration of the relationship between the Employer and Mr. Chand, on an expedited basis.

Did the Director err in finding that the Employer did not make unauthorized deductions from the Employee's wages?

65. The Employee contends that the Director erred in not considering all of the facts related to the rental arrangement between the parties. Specifically, the Employee says the Director did not consider the evidence that the Employer had deducted $350.00 from his wages on November 24, 2017, which he understood was for his rent, and that he had made several month's rent payments directly to Costina, who the Employee understood was a company representative.

66. The Employee argues that if some of his wages had been deducted from his salary for rent, and the Employer's representative collected other rent money on behalf of the Employer, there was clearly a relationship between rent and the Employee's employment. The Employee argues that, in concluding that Mr. Brink offered rental accommodation in his personal capacity, the delegate acted on a view of the facts which could not reasonably be entertained.

67. The delegate submits that the evidence supported his finding that the Employee paid rent to Mr. Brink directly, with one exception, and that the house he lived in was owned by Mr. Brink, not the Employer. The delegate further submits that the uncontested evidence was that the Employee was given the option to live at Mr. Brink's property but was not required to do so. The delegate says that the *ESA* does not prohibit an employee from renting accommodation from a director of his employer.

68. The Employer also submits that the delegate's findings that payments made to Mr. Brink for rent were made to him in his personal capacity and did not represent a payment to the Employer, were factual findings that could reasonably be entertained. The Employer notes that Mr. Brink is not a party to the Employee's employment contract and in the absence of any tenancy agreement, there was no evidence before the delegate to support a finding that the Employer had made unlawful deductions from his wages.

69. The Employer says that Costina did not work for the Employer and submits that the delegate's conclusion that the Employer did not have a rental relationship with the Employee was a reasonable conclusion on the facts. The Employer contends that it would have been an error in law for the delegate to equate Mr. Brink's personal assets and contracts with the Employer's assets and contracts.

70. To conclude that the Employer and Mr. Brink, the Employer's sole officer and director, were separate legal entities for the purpose of rental payments and therefore, not contrary to the *ESA* or the employment contract is, in my view, unsupportable on the evidence.

71. The delegate made no findings about Costina's relationship with the Employer or Mr. Brink. The evidence was that she picked up the Employee from the airport, which suggests she was an employee of the Employer who arranged the Employee's transportation to Prince George. The delegate also failed to consider the Employee's evidence that he gave Costina rent money for the first two months. If Costina was Mr. Brink's employee, it is unclear why she spoke to the Employee about paying fees to Mr. Chand. If she was an employee of the Employer, then those facts support a conclusion that there was a contravention of section 21 of the *ESA*, which prohibits an employer from "directly or indirectly…requir[ing] payment of all or part of an employee's wages for any purpose.." These payments also appear to be contrary to the employment contract, which stipulated that, if housing was provided, it would be provided free of charge.

72. The Employee was a vulnerable employee who entered Canada to wor'k for the Employer. Mr. Brink's status as a landlord was inextricably linked to his status as the Employee's employer, particularly since he is the sole officer and director of the Employer. Neither party appeared to raise a section 95 issue (the "associated employer" provision), nor did the delegate consider it on his own initiative. It seems that, in light of these facts, consideration ought to have been given to the purposes and provisions of the *ESA* in considering this issue. As the Employee argues, the delegate's conclusion in this point "creates a perverse incentive that would allow companies" to circumvent restrictions on TFWs regarding the amount of rent that can be charged.

73. I allow this ground of appeal and refer this issue back to the delegate for reconsideration on an expedited basis.

Did the Director fail to observe the principles of natural justice in delaying the issuance of the Determination for more than three years following the date of the hearing?

74. The Employee contends that the Determination was issued only after the Migrant Workers Centre wrote to a manager at the Employment Standards Branch in 2021 to determine the reasons for the absence of a decision after three years, and that the delay was unreasonable.

75. The Employee says that his monetary claim and the delay in having access to funds which were determined to be owed to him was significantly prejudicial. He further argues that, had he received a timely determination with regards to unauthorized deductions for rent, he may have chosen to pursue a claim with the Residential Tenancy Branch regarding his living conditions, and that, because of the delay, that option is no longer open to him.

76. Further, the Employee argues that the delay calls into question the Director's ability to reach a fair decision, particularly in light of what he contends is the delegate's failure to consider significant evidence in the Determination.

77. The Director agrees that there was an unreasonable delay in issuing the Determination. By way of explanation, the delegate says that the delay was a result of the duties assigned to him as well as personal issues. However, the delegate submits that there is nothing in the *ESA* that enables the Tribunal to grant a declaratory remedy.

78. The Employer took no position on this ground of appeal.

79. There is no question that a three-year delay from the date of the hearing to the date of the issuance of the Determination was inordinate given the purposes of the *ESA*, one of which is to provide for fair and efficient procedures for resolving disputes (section 2(d)). (my emphasis)

80. The Tribunal has refused to cancel determinations where there was a delay of 39 months (*Ecco Il Pane Bakery Inc.* BC EST # D396/00) and over 4 years (*Tung*, BC EST # D028/01) because of the absence of demonstrated serious prejudice (as set out by the test in *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44).

81. I find that the significant delay in issuing the Determination caused serious prejudice to the Employee given his circumstances. Although the Employee speaks, reads, and writes English, he was clearly a vulnerable employee. As a temporary foreign worker, his position in Canada was precarious (see the *Temporary Foreign Worker Protection Act,* SBC 2018, c. 45). He was unfamiliar with his rights and obligations. The fees charged to the Employee by Mr. Chand were significant in light of his background.

82. In my view, the delay, and the fact that it was issued only after several requests by agencies on the Employee's behalf, bring the administration of the Employment Standards regime into disrepute.

83. Despite my findings on this issue, I am not prepared to cancel the Determination, which would be an appropriate remedy in certain circumstances (see, for example, *Ping Kang*, Reconsideration decision 2021 BCEST 40). To do so would deprive the Employee of the monetary award that he is entitled to.

84. Given the length of delay in issuing the Determination, my inclination would be not to remit this matter back to the delegate. However, in light of evidentiary gaps and an absence of factual findings, I refer the matters identified above back to the Director for further investigation on an expedited basis.

ORDER

85. Pursuant to section 115 of the *ESA*, I allow the appeal. I Order that the Director's June 30, 2021 Determination be remitted back to the delegate for determination on the issues identified above.

Carol L. Roberts
Member
Employment Standards Tribunal