Employment Standards TRIBUNAL

Citation: Balaji Vellaikamban (Re)
2021 BCEST 105

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Balaji Vellaikamban

(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.: 2021/069

DATE OF DECISION: December 23, 2021

DECISION

SUBMISSIONS

Jonathon Braun	counsel for Balaji Vellaikamban
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 Balaji Vellaikamban (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 19, 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 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 submissions of the parties, and the Reasons for the Determination (the "Reasons").

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. The Employer hires Temporary Foreign Workers ("TFWs") to meet its machine operator needs. 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. Gabriel Chand ("Mr. Chand") of Chand & Company, who is licensed to practice law in British Columbia, forwarded resumes to the Employer for its review.

13. The Employee is an Indian national with a diploma in electronics and a degree in electrical engineering. He was working in Dubai as a machine operator in 2016 when he responded to an advertisement for machine operator positions which had been posted by Mr. Chand of Chand & Company. The Employee was interviewed by Mr. Chand in Dubai. The Employee's evidence was that Mr. Chand told him that he would be charged $10,000.00 (US) for a LMIA. The Employee understood that these fees were part of a normal process to secure a job in Canada. The Employee paid Mr. Chand a total of $6,000.00 US prior to leaving Dubai; $2,000.00 US paid directly to Mr. Chand, a further $2,000.00 US by electronic transfer on May 17, 2017, identified as a "Recruitment payment" and $2,000.00 US on June 30, 2017, also by way of electronic transfer.

14. Mr. Chand assisted the Employee in completing the necessary documents, including his work permit application and visa documents.

15. The Employee flew to Prince George at his own cost, which was reimbursed by the Employer after his employment was terminated. The Employee arrived on July 3, 2017. The Employee paid "Costina", who the Employee understood was a representative of the Employer, an additional $2,000.00 (US) in cash upon arrival, representing what the Employee understood to be outstanding funds he owed Mr. Chand for immigration documents and a job with the Employer.

16. The Employer offered the Employee accommodation when he arrived in Canada, which the Employee accepted. The Employee paid $350.00 per month to Mr. Brink even though his contract specified that the Employer would provide housing at no cost.

17. The Employee began working at the mill on July 5, 2017. Following one day of orientation, the Employee was assigned cleaning duties. After a few months of performing cleanup tasks, the Employee expressed

dissatisfaction with the work, informing the Employer that this was not the work he was hired to do. The Employee's evidence was that both Costina and Shawn Grattan ("Mr. Grattan"), the production manager, informed him that he would be fired if he did not perform his job.

18. On January 2, 2018, Mr. Grattan informed the Employee that his employment was terminated effective January 9. The termination letter did not specify a reason for the termination.

19. Within hours of receiving the letter of termination, the Employee called Mr. Chand. His evidence was that Mr. Chand informed him that he would have to go home to India, and that his employment was terminated because the Employee did not pay the outstanding money he owed to Mr. Chand.

20. The Employee secured a new job effective February 14, 2018.

21. The Employer's evidence was that the Employee was offered a job which contemplated on-the-job training, and shortly after he began training, the Employee elected to continue in his training role.

22. 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 that individuals like Mr. Chand only assist with finding foreign workers.

23. The Employer contended that Mr. Chand was not authorized to hire employees on its behalf, that it did not pay Mr. Chand or ask him to collect fees of any kind, and that it had never received any form of payment from Mr. Chand either directly or indirectly.

24. Mr. Brink also testified that Costina assists TFWs with finding accommodation in houses owned by Mr. Brink or by the Employer, but denied there was any connection between an employee's accommodation and their employment or that rent payments were deducted from their wages. He said that the Employee was not required to live in one of his houses.

25. Mr. Brink said that he was unaware that the Employee was dissatisfied with his job, and that if he was ready, the Employee would have been moved into an operator position since the mill was always short of machine operators. Mr. Brink said that Mr. Grattan made the decision to terminate the Employee, and understood the Employee was unhappy and wanted to be an electrician. He denied that the Employee was terminated because of Mr. Chand or any unpaid fees. He also testified that the Employer bore all costs associated with bringing TFWs to Prince George for work.

26. Mr. Grattan's evidence was that although he performed all the necessary paperwork to obtain the LMIA, he was unaware that Chand & Company was listed on the document. He testified that the Employer used Mr. Chand's business only to submit the final paperwork. Mr. Grattan's evidence was that Mr. Chand presented him with the Employee's resume. Mr. Grattan said that he offered the Employee a one-year employment contract based on his past experience and after discussing the application with Mr. Brink. According to Mr. Grattan, the Employee approached him in August 2017 about moving to an electrical position but that the Employee remained in the cleanup position because he preferred to wait for an electrical position.

27. Mr. Grattan's evidence was that in December 2016 (I infer this is a typo and was 2017), he was reviewing LMIA renewals and because the Employee was not doing the job he was hired to do, the Employer decided not to renew his LMIA.

Director's Findings

Timeliness

28. 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

29. The delegate determined that the fees Mr. Chand charged to the Employee were not for a prohibited activity. Following a review of the evidence submitted by the Employee, including WhatsApp messages between the Employee and Mr. Chand on January 9, 2018, the delegate determined 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

30. 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. The delegate also noted that there was no suggestion in the documentation that experience in cleaning a mill was required prior to operating machinery. The delegate found Mr. Grattan's evidence that the Employee chose to remain performing cleanup duties because he did not want to move to production (machine operator) internally inconsistent with other evidence that the Employee wanted any position that was not in cleanup. The delegate found that it made no sense for the Employer to hire a TFW at what it asserted was a premium rate to perform cleanup duties for six months. The delegate determined that the Employer had contravened section 8 of the *ESA* in misrepresenting the type of work available.

31. 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 that although Mr. Grattan's evidence that the Employee's employment had been terminated because he did not want to move into a production job, it was more likely that the Employer had no intention to move him into a production job. The delegate concluded that it was likely that the Employer had terminated the Employee because of his "continued, expressed dissatisfaction with the work he had been assigned, in accordance with [the Employee's] evidence that he had been told that he would lose his job if he continued to complain." (Reasons, p. R 9)

32. The delegate determined that, had the Employer not misrepresented the type of work available, the Employee would not have complained, would not have been terminated and would "most likely" have completed his term of employment. Noting 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, pursuant to section 79(2) of the *ESA*. This finding has not been appealed.

Unauthorized Deduction of Wages

33. 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, indicating 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.

34. The delegate found that Mr. Brink was not a party to the employment contract and 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; [the Employee] indeed testified that he chose to rent from Mr. Brink as he was unsure how to find alternate housing. [The Employee] made payments to Mr. Brink and in return received housing…. (Reasons, R 10)

35. 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

36. 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.

37. The delegate considered 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 the Employee 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 terminated because of the Employee's dissatisfaction with the Employer's misrepresentation of the type of work available rather than 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. The delegate concluded that the Employer had not contravened section 83 of the *ESA*.

ARGUMENT AND ANALYSIS

38. 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.

39. 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*.

40. 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

41. 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?

42. 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.

43. 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. Specifically, the Employee says, no reasonable person could reach a conclusion that a payment identified as "Recruitment payment" was not a recruitment payment.

44. 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 his findings of fact were grounded in the evidence at the hearing and as such, is not subject to review on appeal.

45. 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.

46. The evidence before the delegate was that the Employee met with Mr. Chand in Dubai regarding the position with the Employer, that the Employee was referred to a position with the Employer by Mr. Chand, that the Employer relied on third parties, including Chand & Company to find them potential candidates (foreign workers).

47. The Employer did not interview the Employee; rather, Mr. Grattan, after reviewing the resume provided to him by Mr. Chand with Mr. Brink, offered the Employee a position.

48. 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, among other things, that that he was still waiting for his final $2,000.00 US payment which the Employee was to pay to Costina. In the phone call, Mr. Chand stated that he worked for the Employer.

49. The record shows that the documentary evidence before the delegate consisted of a copy of support letter and contract, the LMIA indicating that Mr. Chand was a third party for the Employer, and electronic funds transfers made by the Employee to Mr. Chand, one of which contained a notation that the fee was for recruitment purposes.

50. The delegate made no attempt to reconcile the Employer's evidence with the documentary evidence suggesting that at least part of the fees was paid for recruitment purposes or the Employee's evidence that upon arrival in Canada he paid Costina, who was a representative of the Employer, an additional $2,000.00 US towards 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.

51. 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 Employee would pay Mr. Chand's fees to Costina, particularly when, as Mr. Brink testified, fees charged by Mr. Chand were between Mr. Chand and his clients.

52. 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.

53. 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.

54. I refer this aspect of the Determination back to the Director for 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?

55. The Employee contends that the Director erred in not considering all of the facts related to the rental arrangement between the parties. The Employee argues that, in concluding that Mr. Brink offered rental accommodation in his personal capacity, the Director committed an error of law and breached the principles of natural justice.

56. The Director says that the evidence supported his finding that the Employee paid rent to Mr. Brink directly, and that the house the Employee lived in was owned by Mr. Brink, not the Employer. The Director 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 Director says that the *ESA* does not prohibit an employee from renting accommodation from a director of his employer.

57. 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.

58. The Employer further 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.

59. Section 21 of the *ESA* prohibits an employer from "directly or indirectly…requir[ing] payment of all or part of an employee's wages for any purpose." 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.

60. The delegate made no findings about Costina's relationship with the Employer or with Mr. Brink. If Costina was indeed Mr. Brink's employee, it is unclear why she accepted $2,000.00 US on Mr. Chand's behalf. If she was an employee of the Employer, then the facts support a conclusion that there was a contravention of section 21. 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.

61. The Employee was a vulnerable employee who entered Canada to work 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. The delegate appears not to have considered the provisions of section 95 (the "associated employer") of the *ESA* in his analysis. As the Employee argues,

the delegate's conclusion in this regard "creates a perverse incentive that would allow companies" to circumvent restrictions on TFWs regarding the amount of rent that can be charged.

62. 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?

63. 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.

64. 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.

65. 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.

66. 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.

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

68. 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)

69. 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).

70. 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.

71. 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.

72. 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.

73. 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

74. 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