Employment Standards TRIBUNAL

Citation: 1170017 B.C. Ltd.(Re)
2021 BCEST 23

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

1170017 B.C. Ltd.

- 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.: 2020/128

DATE OF DECISION: March 8, 2021

DECISION

SUBMISSIONS

Min Su (Joshua) Yang — counsel for 1170017 B.C. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), 1170017 B. C. Ltd. carrying on business as The Chicken (the "Employer") filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 31, 2020.

2. The Director found that the Employer had contravened sections 17/18, 40, 45/46, 58 and 63 of the *ESA* in failing to pay three former Employees regular and overtime wages, statutory holiday and annual vacation pay and compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $68,896.49. The Director imposed seven $500 administrative penalties for the contraventions, for a total amount payable of $72,396.49.

3. The Employer contends that the Director erred in law in making the Determination. The Employer also says that evidence has become available that was not available at the time the Determination was being made.

4. The deadline for filing an appeal of the Determination was September 8, 2020. The appeal was filed on August 28, 2020, and the Employer sought an extension of time in which to file additional written submissions to October 9, 2020. The Tribunal's Registrar requested that the Employer file those submissions no later than October 9, 2020. On September 8, 2020, the Employer filed a 47-page appeal submission.

5. 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 it unnecessary to seek submissions from the Employees or the Director.

6. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the Employer's submissions, and the Reasons for the Determination.

FACTS

7. The Employer operated a restaurant in Victoria, B.C. The Employer was incorporated on June 28, 2018, with two directors, Hoy Jin Choi and his spouse, Mi Ja Kim. Ms. Kim was removed as a director on March 26, 2019.

8. Three former employees (collectively, the "Employees") filed complaints alleging that the Employer had contravened the *ESA* in failing to pay them regular and overtime wages, vacation pay, statutory holiday pay, commissions and compensation for length of service. The three Employees, Hongbyung Chai ("H.C."),

Jeongah Choi ("J.C.") and Yaeseul Chai ("Y.C."), were members of the same family, being a husband, wife and a daughter. They submitted their evidence jointly and were all represented by one lawyer. Although employed for slightly different periods, they were all employed between October 1, 2018, and March 14, 2019, at different rates of pay.

9. The Director's delegate decided the complaint through an investigation process. He issued a Demand for Employer Records under section 85 of the *ESA* and sought submissions from the parties. The delegate also emailed a series of questions to a number of witnesses, two of whom declined to participate in the investigation. The information was provided to the parties, both of whom were represented by counsel, and each given the opportunity to respond. Both parties made lengthy written submissions to the delegate on the issues, including whether there was a partnership agreement between Mr. Choi and H.C, whether Y.C. was a manager, and the wage entitlement for each of the complainants.

Employees' evidence

10. H.C. alleged that he was working at another restaurant when Mr. Choi approached him to work as the head chef for the Employer. H.C. claimed that the parties agreed that he would be paid a monthly salary based on an eight-hour workday, and commission wages based on the monthly sales of certain dishes produced by the restaurant. H.C. started work on October 1, 2018, and alleged that he worked 14 hours per day, Monday through Saturday, and 11 hours a day on Sunday, because Mr. Choi had not hired enough cooks. He provided the delegate with documentation identifying the hours and days he worked throughout his employment.

11. As head chef, H.C. was required to train new and existing staff, develop special and seasonal dishes, order ingredients, create schedules for staff, and wash dishes during down time. Approximately 10-20% of H.C.'s time was spent training employees. If Mr. Choi or his wife could not be at the restaurant to interview applicants, H.C. would conduct the interview, asking questions prepared by Mr. Choi and his wife. Mr. Choi and his wife were responsible for employee performance management, scheduling and terminations, and made all decisions regarding employees. H.C. said that he did not have any authority to hire or fire employees, alter the restaurant hours or decide the employees' wage rates. He also said that he did not have access to financial records and was not privy to the business dealings of the company, including the restaurant's lease agreements or the negotiation of its sale.

12. H.C. said that he was to be paid commissions at the end of the month, along with a receipt confirming the total sales of the identified dishes. However, when H.C. received his commission wage statement for October, the statement included deductions for utilities, food and employee expenses which were not part of the agreement. H.C. also said that Mr. Choi did not provide him with receipts confirming the net sale amounts the commission wages were to be based on. Mr. Choi and his wife explained to H.C. that if they sold the business, they would be able to pay him the remainder of his unpaid wages. H.C. told Mr. Choi that he wanted to quit, and that if Mr. Choi was having trouble meeting his obligations, he should sell the business. In response, Mr. Choi threatened to close the business and fire all the staff. In response to the Employer's concerns, H.C. offered to work from the restaurant opening to closing, provided he was paid overtime wages. That arrangement was intended to be temporary until the Employer hired additional staff.

13. Although the Determination lacks consistency on this point, Mr. Choi and his spouse apparently sold the restaurant on March 14, 2019, and Mr. Choi advised all employees to stop coming to work. The Determination indicates that at some point before the sale, Mr. Choi spoke with H.C. to see if he was interested in purchasing the business. H.C. declined to do so at the price being asked. H.C. alleged that Mr. Choi told him that if he was not interested in purchasing the business, he should not return to work. H.C. returned his key to the Employer on March 17, 2019.

14. After his employment ended, H.C. wrote to Mr. Choi and his wife seeking to discuss outstanding matters, including outstanding wages. Mr. Choi informed H.C. that if he chose to use legal avenues, he would not be paid at all.

15. H.C. submitted a copy of an agreement, which was written in Korean, along with a translation of the document. The agreement, between Mr. Choi and his wife and H.C., provided, among other things, that H.C. was to pay $5,000 per month towards rent, 50% of the utilities, 70% of the gas bill and that H.C. would be responsible for the maintenance of the dishwasher. H.C. was to receive the proceeds of all sales of Korean and Chinese dishes. The agreement further provided that if the business was sold, H.C. would receive 20% of the sale proceeds and that if Mr. Choi was to sell the business without H.C.'s agreement, H.C. would be entitled to 40% of the sale proceeds.

16. H.C. alleged that the Employer did not provide him with any documentation for his November 2018 commission wages. He said that Mr. Choi told him he was unable to pay all of his commission wages, but that he would pay H.C. what he could afford. Mr. Choi told H.C. that he would track his commissions and expected to be able to pay him what he was entitled to the following July, when he expected the business to pick up. H. C. said that he agreed to continue working at the restaurant because he did not want the Employer or the other employees to experience hardship. H.C. also said that he expected the summer business to be more profitable, and that he would receive his outstanding wages.

17. H.C. provided the delegate with copies of 12 cheques he received from the Employer between November 15, 2018, and March 12, 2019. He said that although he received some wage statements, they were incorrect, and they had not been given to him at the time his wages were paid. H.C. also submitted other documentation relating to the sales of certain items, as well as a T4 dated February 11, 2019.

18. Y.C., H.C.'s daughter, claimed regular and overtime wages for work performed as manager of the restaurant between January 2019 and March 2019. She alleged that she was to be paid a monthly wage. She provided the delegate with a record of her hours of work. She said she had some authority to purchase small items, such as serviettes and soda, but that she most often purchased items identified by Mr. Choi using a company credit card.

19. In addition to waiting on tables, Y.C. supervised and trained other employees, translated instructions, and waited on tables. She said that 80-90% of her time was spent waiting on tables, while the other 10-20% was communicating with suppliers, running errands for Mr. Choi and making small purchases. She had to consult with Mr. Choi before making any significant decisions and had no authority to hire or fire employees.

20. At the end of February 2019, the gas company contacted the restaurant regarding its overdue gas bill. Although the restaurant required gas to operate, Mr. Choi refused to authorize Y.C. to pay the bill.

21. On about March 22, 2019, Y.C. received a payment directly from an app-based delivery service. Mr. Choi told Y.C. that he was selling the business and that she was to take the payment, along with cash from the till, as compensation for her outstanding wages.

22. Y.C. provided the delegate with bank records showing deposits into her account from the Employer for wages. She said that after asking the Employer for wage statements, she received a statement on February 15, 2019, showing that she worked 87 hours and the amount she had been paid. When Y.C. told Mr. Choi that the amounts were incorrect, he told her that he would issue her a corrected statement. She received a second statement in February which she believed was still incorrect. Y.C. told the delegate that Mr. Choi assured her that she would be paid outstanding wages regardless of what the statement specified.

23. Y.C. requested her outstanding wages from the Employer on March 28, 2019, noting that her employment agreement specified a monthly wage for 40 hours per week. Y.C. provided the delegate with several text messages between herself and Mr. Choi discussing payroll, the sale of the business, outstanding wages and a potential claim for bankruptcy.

24. In her complaint to the Director, H.C.'s wife J.C. also alleged outstanding regular and overtime wages for work performed as a chef between October 1, 2018, and March 14, 2019. According to her employment agreement, she was to be paid a monthly salary for 160 hours of work per month.

25. J. C. did not receive a wage statement during her employment until February 2019, although the Employer told her he had prepared them and that they would be retained in his computer should she need them. Upon receiving the statements, J.C. found them to be inaccurate. J.C. submitted copies of cheques provided to her by the Employer between October 15, 2018, and January 3, 2019, as well as some wage statements, in support of her claim.

26. J.C. also provided the delegate with a copy of a Commercial Contract of Purchase and Sale of the business, dated March 13, 2019.

27. The delegate also obtained evidence from two former employees of the restaurant regarding H.C. and Y.C.'s responsibilities and hours of work.

Employer's evidence

28. The Employer's position was that H.C. was not an employee; rather, H.C. and Mr. Choi went into the restaurant business together. The Employer, through his counsel, submitted an agreement which Mr. Choi asserted represented the terms of their business arrangement along with a translated version of the agreement. This was the same document submitted by H.C.

29. The Employer argued that there was nothing in the agreement specifying any amount of wages or commission wages. The Employer asserted that, because H.C. was not an employee, there was no obligation for him to record H.C.'s hours of work.

30. The Employer contended that Y.C. was hired by H.C. as the manager of the restaurant when Mr. Choi decided he no longer wanted to work there. The Employer asserted that Y.C. lied to a representative of

the app company by claiming to be the owner of the restaurant in order to receive the money that was owed to the restaurant. The Employer also provided the delegate with wage statements and documents outlining payments made to Y.C.

31. The Employer contended that J.C. worked for the restaurant as a cook, and that there was no agreement she would be paid a monthly wage; rather, she was paid on an hourly basis. The Employer contended that Y.C. was responsible for ensuring that all employees, including J.C., signed in and out of work using the restaurant's timekeeping system. The Employer asserted that J.C. did not work any overtime, and that she had been paid for all hours worked save for some hours in December 2018.

32. The Employer provided the delegate with names of three former employees as witnesses. Two of those individuals declined to participate in the proceedings. One of the witnesses said that Y.C. was her manager beginning in January 2019, and that Y.C. was responsible for directing employees, hiring and firing employees, setting the schedules and other management tasks.

33. A third witness, who also worked at the restaurant as a cook, informed the delegate that it was her understanding that the Employer and H.C. were business partners, as H.C. described himself as an owner. She later clarified that The Chicken and another restaurant, called Jongro Ban Jeom operated out of the same restaurant space. She said that Jongro Ban Jeom was the name of H.C.'s business, which sold Korean and Chinese food, while The Chicken was Mr. Choi's part of the business. The witness said that H.C. and Mr. Choi were both responsible for employee scheduling, and that she observed H.C. setting business hours and hiring, training and firing employees.

34. The witness estimated that 95% of J.C.'s time was spent washing dishes, and 5% spent cooking. The witness said that H.C. terminated her employment after deciding that the restaurant did not require a part-time cook.

35. A fourth witness worked as a waitress at the restaurant until about December 2018. She informed the delegate that H.C. was always at the restaurant before she arrived, and that he was responsible for setting her schedule. She also informed the delegate that H.C. terminated her employment.

Determination

36. The delegate considered lengthy submissions from counsel for both H.C. and the Employer regarding H.C.'s status. The Employer took the position that H.C. was a business partner, while H.C. contended that he was an employee.

37. The delegate found that the evidence suggested that there was "some sort of partnership agreement" in place between the parties. He continued:

> However, there is payment evidence, or rather a lack of payments to H.C., in addition to the agreement regarding the scenario in which H.C. had no say in the sale of the business, and evidence suggesting H.C. never made any payments for rent or other items, as would be expected per the partnership agreement, which lead me to find the terms of the partnership were not agreed to.

> Regarding H.C.'s Employment Standards Branch complaint, the question that must be asked is not "Was H.C. was a partner or officer?" but rather, "did H.C. perform work as an employee? The parties, and witnesses, agree H.C. was the Head Chef at The Chicken. The Employer argued H.C. was a partner at The Chicken, as thus had no claim to wages under the Act. The Complainants argued H.C. was an employee for the duration of his employment and thus entitled to the minimum standards established in the Act. [reproduced as written]

38. The delegate found that the Employer, not H.C., was in charge of cash, based on the cheques issued by the Employer, as well as "wage documents" containing the restaurant's net sales. Even though the Employer submitted bank records that, it alleged, showed withdrawals that were made by H.C. or Y.C., the delegate found insufficient evidence to show what the withdrawals were for, or that H.C. or Y.C. actually made the withdrawals. Further, the delegate found, even if H.C. had made the withdrawals, that fact was not determinative of H.C.'s status.

39. The delegate also considered the question of whether or not H.C. and Y.C. were managers.

40. He noted that H.C. was responsible for hiring and firing staff and setting employee schedules. He found that while H.C. was able to make purchases on behalf of the restaurant, those purchases were incidental to his role as head chef. The delegate found there was no evidence to suggest H.C. negotiated any contracts with vendors or suppliers. He also noted that the employment dispute originated when the restaurant was unable or unwilling to produce sales reports or budgetary documents, raising questions about H.C.'s commissions. The lack of clarity in the restaurant's finances led the delegate to conclude that H.C. lacked any financial authority over the restaurant's operations that would indicate a managerial role.

41. The delegate determined that while H.C. had some authority to schedule, and hire and fire employees, his primary responsibilities were as head chef. The delegate concluded that H.C. was an employee, not a manager, and entitled to overtime and statutory holiday pay.

42. Similarly, while the delegate found that Y.C. had some managerial responsibilities, he concluded that she was not a manager. Although he found that Y.C. notified the restaurant employees that their employment had been terminated, he concluded that she was simply the messenger for a decision that the Employer made. He also found that although she had been given the restaurant's log in information for payment purposes, she had only been given that information in February 2019, when the system malfunctioned and required immediate attention. The delegate found that being provided this information in an emergency, well over one month after being hired, was not determinative of Y.C.'s managerial responsibility.

43. The delegate also noted that the evidence of Y.C. as well as witnesses, was that Y.C. often served customers. He found that it was not unreasonable that Y.C.'s duties often included serving, since there were often few other employees in the restaurant. He concluded that Y.C.'s primary responsibilities were as a server, with ancillary duties as a manager.

44. The delegate concluded that the Employer had not demonstrated that Y.C.'s principal duties were managerial in nature.

45. The delegate considered all of the evidence regarding the Employees' hours of work, including the Employees' evidence, timesheets, a "sales heatmap," wage statements and wage payments, closing reports and receipts as well as the evidence of witnesses. The delegate also noted that the Employer had not maintained an accurate record of the Employee's hours of work as required by section 28 of the *ESA*. The delegate made findings on the hours of work of each of the Employees based on all this information.

46. The delegate determined that there was no evidence the Employer had just cause to terminate the Employees' employment and that both H.C. and J.C. were both entitled to compensation for length of service. He concluded that Y.C. was not entitled to compensation under section 63 as she had worked for less than three months.

47. The delegate found there was insufficient evidence to determine what, if any, commissions H.C. might be entitled to. In the absence of any clear evidence on H.C.'s wage rate, the delegate concluded that he was limited to finding H.C. was entitled to the minimum hourly wage.

48. The delegate found that H.C., Y.C. and J.C. were entitled to overtime wages, statutory holiday pay and vacation pay.

ARGUMENT

49. In the appeal submissions, counsel for the Employer, who was not the counsel who represented the Employer before the delegate, sets out "facts" that are not part of the Determination. I have not considered those submissions as facts but as part of the argument.

50. Counsel advanced a number of arguments which I summarize as follows.

51. The delegate erred in law by:

- misconstruing the nature of the partnership agreement and the business relationship between the parties;
- misapprehending the evidence as to the nature of the partnership agreement;
- failing to consider the totality of the evidence in determining the essential terms of the partnership agreement; and
- acting on a view of the facts that could not be reasonably entertained, misapprehending the evidence and wrongly discounting other evidence in finding that both Y.C. and J.C. were employees;

52. Counsel submits that there was a joint venture agreement between Mr. Choi and H.C. rather than an employment agreement, that H.C. hired his spouse as an employee and his daughter as the manager of the restaurant, and that the delegate failed to properly appreciate the business arrangement between the parties.

53. Counsel also advances serious allegations on appeal that had not been advanced during the investigation process, including that the Employees, collectively or individually, engaged in "witness tampering," "manipulation of evidence with malice" and "perjury." I note that the Employer, who was represented

by a different counsel throughout the investigation process, advanced no such allegations. Counsel provides no evidence in support of these allegations and I find them to be entirely without merit.

54. Counsel for the Employer also argues that evidence has become available that was not available at the time the Determination was made. The essence of the submissions on this ground center on the following:

- the correct English meaning of some terms used in, and the accuracy of the translation of, the partnership agreement;
- information on H.C.'s previous businesses and allegations about H.C.'s business acumen;
- allegations that Y.C. threatened one of the witnesses, and that Y.C., H.C. and J.C. swore false affidavits; and
- new evidence from a witness who wanted to remain anonymous.

ANALYSIS

55. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that there is no reasonable prospect the appeal will succeed.

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

(a) the director erred in law;

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

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

57. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that the Appellant has done so in this case.

58. An appeal is designed to be an error-correction process, not an opportunity for a party who has been unsuccessful before the delegate to re-argue the case or to present evidence that ought to have been presented to the delegate at first instance.

59. Much of the Employer's ground of appeal is an attempt to reargue facts already considered by the delegate. Counsel for the Employer also submits a large amount of "new evidence" on appeal, some of which relates to the accuracy of the Korean language documents submitted to the delegate. Counsel asserts that the documents submitted by H.C. were "mistranslated," and "manipulated in bad faith," and provides his own interpretation of some of the words. For example, Counsel, who appears to be a native Korean language speaker, suggests that the partnership agreement contains references to H.C. as "Gaab" and Mr. Choi as "Eul," and that those terms have particular meanings. He argues that the delegate ought to have obtained certified translations of those documents, and his failure to do so constitutes an error of law.

60. Counsel argues that because of what he asserts is improper translation of the evidence, all of the Employees' affidavits and supporting documents "should not be considered as legitimate evidence." Counsel requested that the Tribunal "order the complainants to translate all their affidavits and supporting documents by a certified translator who is accredited by the Society of Translators and Interpreters of B.C."

61. It is not the Tribunal's role on appeal to make any such order. Both parties were represented by counsel throughout the investigation, and presumably had sufficient facility with the English language to both enter into legal agreements (including lease agreements and incorporation documents) as well as instruct counsel. If the Employer had concerns with the quality of the English language translation of any document, he ought to have raised his concerns to the delegate through his lawyer. Given that the Employer had many opportunities to review and respond to the documents at first instance, it is not now open to him to challenge that interpretation. Furthermore, while the delegate had the authority to request that the parties provide him with an English version of the documents translated by a certified interpreter/translator, he was under no duty to independently obtain an "official" English language version, particularly given that the parties were represented by counsel.

62. Finally, when Counsel provides his own English language version of the documents and makes arguments based on that version, he risks becoming a witness in the case, which is a contravention of the Canadian Bar Association's Code of Professional Conduct.

New Evidence

63. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

64. I find that the "new evidence" submitted on appeal does not meet the Tribunal's test for new evidence.

65. All of the documentation submitted on appeal was available, with the exercise of due diligence, at the time of the investigation, including the "mistranslated" documents, threatening of witnesses and allegations that H.C. was a poor businessman. I note that, in any event, the Employer did argue before the delegate that H.C. "doctored" the partnership agreement but did not provide an English language version that had been certified by an independent translator. Consequently, the allegation that there was a difference between the two English language versions of the agreement was before the delegate, even though the delegate did not make any specific findings on that issue.

66. As noted, both parties were represented by counsel during the investigation. For Counsel to now assert that he has spoken with some of the same witnesses identified by the parties and a new one who was never called and wishes, nevertheless, to remain "anonymous," is not new evidence. Had the Employer wanted the witness, who now seeks to give evidence under the cloak of anonymity, to give evidence, he ought to have provided the name of that witness to the delegate along with the basis for remaining anonymous. The delegate would have had the opportunity to consider that request and either allowed or denied it. Similarly, for Counsel to re-interview witnesses who have already provided their evidence to the delegate and claim that their "new" evidence ought to be considered on appeal, does not fall within the parameters of what constitutes new evidence.

Error of Law

67. 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.

68. The principal basis for the Employer's appeal is that the delegate misconstrued the agreement between the Employer and H.C., contending that the arrangement between the parties was that of a joint venture or a partnership, rather than an employee-employer relationship. I note that this issue was amply argued before the delegate by then-counsel for the Employer.

69. The Employer argues that there is "no intelligible rationale" for the delegate's conclusion that H.C. was an employee rather than a business partner and that the delegate acted without evidence or acted on a view of the facts that cannot reasonably be entertained.

70. The Employer says that the delegate failed to provide the "reasoning process or insights and never provided a detailed explanation of his negative findings in regards to the existence of the joint venture for the restaurant business."

71. In *Canada (Minister of Citizenship and Immigration) v. Vavilov* ((2019) SCC 65), the Supreme Court of Canada noted that while reasons are not required for all administrative decisions, cases in which written reasons tend to be required include those in which there is a right of appeal. (at para. 77)

72. The Court stated that:

> Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power… (at para. 79)

73. However, "written reasons must not be assessed against a standard of perfection" (at para. 91) and must be assessed in light of "the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision." (at para. 93)

74. The Court added that:

> The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency… (at para. 94)

75. I agree that the delegate's reasons could have been better and more thoroughly articulated. Had he provided a more fulsome explanation for his conclusion, this appeal may have been avoided, at least in part. However, having reviewed the record and the reasons, I am not persuaded the delegate acted without any evidence or acted on a view of the facts that could not be entertained.

76. The record demonstrates that the lease for the property, which is dated July 20, 2018, was between the landlord, and the numbered company and Mr. Choi and his wife. H.C. had no financial obligations under that lease agreement. There was no evidence H.C. had access to any financial records or signing authority over business accounts. He was not a director, officer or shareholder of the numbered company. There was no evidence H.C. had the ability to hire and fire employees. Furthermore, there was no evidence H.C. was consulted about the sale of the business or that he received any proceeds from its sale. The record discloses that the corporate Employer issued the pay cheques for the employees and H.C. had no participation in that process. While there was some form of agreement between the parties regarding the business, I am unable to find that the delegate erred in concluding that H. C. was an employee. Furthermore, even if a partnership arrangement had been contemplated at some point, such arrangement did not preclude H.C. from also being an employee. (see *McPhee*, BC EST # D183/97; *Bell*, BC EST # D268/96; and *Re Lambert cob Soprano's International Oyster Bar & Grill*, BC EST # D199/04, Reconsideration dismissed BC EST # RD036/05)

77. Similarly, although the Employer argues that the delegate erred in finding that both Y.C. and J.C. were employees of the Employer, I find that the delegate's conclusion was rationally supported by the evidence. Both J.C. and Y.C.'s wages were paid by way of cheques issued by the corporate Employer, of which Mr. Choi and his wife were the only directors. As I have found the delegate's conclusion that H.C. was an employee and not a partner to be supportable on the evidence, there is no basis for finding that Y.C. and/or J.C. were employees of H.C. Although counsel advances allegations against H.C. attempting to "extort" the numbered company by "manipulating the employees, landlords of the property and relevant parties and threatening [Mr. Choi]", these allegations are not supported by the record. Again, they appear to be made, for the first time, by counsel on appeal.

78. I also find that the delegate's conclusion that Y.C. was not a manager to be rationally supported by the evidence. The delegate found that although Y.C. may have had some management functions, her principal

duties were as a server. I find no error of law, as the Determination followed the leading Tribunal case on this issue: *Director of Employment Standards*, BC EST # RD479/97 (*Amelia Street Bistro*).

79. Finally, counsel submits that the delegate erred in failing to contact a witness to determine why she did not want to give evidence, rather than simply discounting her evidence entirely. Counsel asserts that the witness was being threatened, and the delegate ought to have inquired into whether or not there was "witness tampering." Counsel misapprehends the role of the delegate. If a party offers the name and contact information of a witness on their behalf, the delegate has no ability to ascertain why that witness does not return telephone calls or refuses to respond to correspondence. It is not the delegate's function to inquire into the reasons for that refusal in the absence of any other information. I find no error in this respect.

80. I find, pursuant to section 114(1)(f), that there is no reasonable prospect that the appeal will succeed.

ORDER

81. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated July 31, 2020, is confirmed in the amount of $72,396.49, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal