Employment Standards TRIBUNAL

Citation: Brink Forest Products Ltd. (Re)
2022 BCEST 19

EMPLOYMENT STANDARDS TRIBUNAL

Applications for Reconsideration

- by -

Brink Forest Products Ltd.
("BFPL")

- of Decisions issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: David B. Stevenson
Kenneth Thornicroft
Shafik Bhalloo

FILE Nos.: 2022/009 and 2022/010

DATE OF DECISION: March 15, 2022

DECISION

SUBMISSIONS

Jordan F. Thorne on behalf of Brink Forest Products Ltd.

OVERVIEW

1. Brink Forest Products Ltd. ("BFPL") seeks reconsideration of two decisions of the Tribunal, 2021 BCEST 104 and 2021 BCEST 105 (the "original decisions"), both dated December 23, 2021, made by Tribunal Member Carol Roberts (the "Tribunal Member")

2. The original decisions considered appeals of two Determinations, which include reasons for the Determinations, issued by a delegate of the Director of Employment Standards (the "Director") on June 30, 2021.

3. The Determinations were made by the Director on complaints filed by Jithin Johnson ("Mr. Johnson") and Balaji Vellaikamban ("Mr. Vellaikamban"), each of whom alleged BFPL had:

- contravened section 8 of the *ESA* by inducing each of them to become an employee by misrepresenting the type of work available;
- contravened section 10 of the *ESA* relating to a $10,000.00 (US) fee charged to each of them by a Gabriel Chand ("Mr. Chand"), who they alleged had recruited each of them and prepared some documents required under the federal Temporary Foreign Worker Plan ("TFWP");
- contravened section 21 of the *ESA* by requiring Mr. Johnson and Mr. Vellaikamban to pay for rental accommodation;
- contravened section 83 of the *ESA* by mistreating each of them due to a complaint or investigation under the *ESA*; and
- failed to pay overtime wages.

4. The Director conducted hearings on the complaints, addressing the allegations made by Mr. Johnson in a hearing conducted on April 17, 2018, and addressing the allegations made by Mr. Vellaikamban in a hearing conducted April 17, 2018.

5. The Director found BFPL had contravened section 8 of the *ESA* in respect of the employment of both Mr. Johnson and Mr. Vellaikamban by misrepresenting the type of work available and ordered BFPL to pay wages to each of them in an amount equal to what each would have earned between January 9 and February 14, 2018 (the latter date being when each of them found alternate employment), which the Director calculated to be $4,714.36. The Director also imposed an administrative penalty in each Determination for the section 8 contravention. The total amount of the Determination for each of Mr. Johnson and Mr. Vellaikamban was $5,214,36.

6. On the other elements of the complaints filed by Mr. Johnson and Mr. Vellaikamban, the Director considered whether there was a contravention of section 10. The questions on that issue, as perceived

and framed by the Director in each Determination was whether, "firstly if the fees charged to Mr. Johnson and Mr. Vellaikamban were for a prohibited activity, and secondly if BFPL was responsible for charging the fees".

7. The "prohibited activity" in this case, was described in the Determinations as "directly or indirectly charging a fee from an individual for securing a job or providing information about potential jobs". Such activity would, in this case, have included recruiting Mr. Johnson and Mr. Vellaikamban, who were foreign workers, for employment with BFPL. In particular, Mr. Johnson and Mr. Vellaikamban argued that Mr. Chand, acting on behalf of BFPL, provided services that were concerned, in effect and objective, with securing employment for Mr. Johnson and Mr. Vellaikamban for a fee, and providing other services related to that employment. The Director found no contravention of section 10 of the *ESA* had been shown by either Mr. Johnson or Mr. Vellaikamban and, based on that finding, did not find it necessary to address whether BFPL was responsible for charging the fees.

8. The Director also found that BFPL did not, directly or indirectly, make deductions from Mr. Johnson's and Mr. Vellaikamban's wages, that no overtime was owed, and that it was unnecessary to consider whether section 83 of the *ESA* had been contravened, as the remedy for any potential contravention of that provision would be identical to the remedy provided for a contravention of section 8; in any event, the Director concluded BFPL had not contravened section 83.

9. An appeal of each Determination was filed by Mr. Johnson and Mr. Vellaikamban, in which both alleged the Director had erred in law and failed to observe principles of natural justice in making the Determinations, specifically in finding BFPL had not contravened section 10 of the *ESA* and in finding BFPL had not contravened section 21 of the *ESA*.

10. The appeals also contended the Director had failed to observe principles of natural justice by failing to issue the Determinations for more than three years following the complaint hearings.

11. On that aspect of the appeals challenging the finding there was no contravention of section 10 of the *ESA*, the Tribunal Member making the original decisions found the Director had erred in law by acting on a view of the facts that could not be reasonably entertained.

12. On that aspect of the appeals challenging the finding there was no contravention of section 21 of the *ESA*, the Tribunal Member found the Director had erred in law by, in some respects, making findings of fact without evidence and, in other respects, by reaching conclusions on the available facts that were unsupportable on the available evidence. The Tribunal Member found the Director failed to make findings on material elements of this matter, even though there was evidence which would have supported a conclusion that section 21 had been contravened and, in light of those facts and in the circumstances, decided those claims warranted further examination.

13. The appeals on the above two issues were allowed, and the matters were referred back to the delegate who had made the Determinations to be addressed on an expedited basis.

14. In reaching the conclusions on section 10 and section 21, the Tribunal Member examined elements of the evidence that was, or was not as the case may be, presented to the Director in the complaint process and addressed, or not addressed, by him in the Determinations. We shall examine the analysis in the original

decisions more closely later in this decision, as the assessment of the Tribunal Member of the relevant facts, as found by the Director and which directed his conclusions on the complaints, forms the crux of these applications.

15. The Tribunal Member making the original decisions, while finding the delay of more than three years was significant and seriously prejudicial to Mr. Johnson and Mr. Vellaikamban, declined to allow the delay to affect the Determinations, but referred the matter back to the Director to be addressed on an expedited basis.

16. These applications seek to have the original decisions reviewed and changed on reconsideration this panel of the Tribunal.

ISSUE

17. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in these applications is whether this panel of the Tribunal should cancel or vary the original decisions.

BFPL'S ARGUMENTS

18. While there are two Determinations, two appeal decisions and two applications for reconsideration, one evolving from the complaint filed by Mr. Johnson and the other from the complaint filed by Mr. Vellaikamban, each are companion pieces, based on very similar facts, reasoning and result. In addressing the applications for reconsideration, we do not intend to repeat the submissions made for each application. Our reference to the arguments made in the applications will apply to each unless the context or the facts require reference to the individual circumstances of Mr. Johnson or Mr. Vellaikamban.

19. BFPL says the Tribunal Member making the original decisions failed to observe principles of natural justice in finding the Director erred in concluding section 10 of the *ESA* had not been contravened by failing to consider, or ignoring, important pieces of evidence, misunderstood some of the evidence that was provided to the Director, and acted on a view of the facts that could not reasonably be supported in finding the Director erred in concluding section 21 of the *ESA* had not been contravened.

20. However, the arguments of BFPL on the above matters do not reveal any plausible basis on which the original decisions ought to be disturbed on natural justice grounds, as the natural justice breach alleged does not relate to the procedures followed by the Tribunal Member, or to any perceived bias.

21. Rather, BFPL disputes the validity of the Tribunal Member disturbing findings of fact made in the Determinations. Effectively, BFPL submits the Tribunal Member inappropriately engaged in a weighing of the evidence, and did so without reference to important pieces of evidence that were considered by the Director in his findings on the complaints.

22. In substance, therefore, this part of BFPL's submission on the application is that the Tribunal Member committed errors of law.

23. The arguments of BFPL on the above matters contend the following evidence cited by the Director in the Determination for Mr. Johnson was ignored in the original decision relating to him:

- The evidence of Mr. Johnson that the fees he paid to Mr. Chand were for a job and he had obtained a visa and work permit on his own without the assistance of Mr. Chand was contradicted by documentary evidence provided by him, which included a letter from Mr. Chand to the Embassy submitting his work permit and visa applications and 20 documents in support;
- Electronic transfer payments from Mr. Johnson to Mr. Chand indicated they were being made to "Jithin's solicitor";
- Payment to Mr. Chand was structured as an initial deposit with the balance due after Mr. Johnson's visa had been issued; and
- That Mr. Chand's comments to Mr. Johnson on the telephone about the reasons for his termination were made as a result of Mr. Chand's own motivation to be paid as opposed to any actual authority on Mr. Chand's part to have him terminated.

24. The argument of BFPL says the following evidence cited by the Director in the Determination for Mr. Vellaikamban was ignored in the original decision relating to him:

- The evidence of Mr. Vellaikamban that he understood Mr. Chand was providing him with immigration services;
- Correspondence between Mr. Vellaikamban and Mr. Chand discussing the cost of obtaining a visa from an immigration lawyer;
- The evidence of Mr. Grattan, described in the Determination as BFP's operations manager, that Mr. Chand had no authority to hire or fire employees on behalf of BFP; and
- Mr. Vellaikamban described "Costina" (a person not otherwise identified in either the Determinations, or in these applications) as Mr. Chand's secretary in the documentation.

25. BFPL submits the Tribunal Member making the original decisions "misunderstood the evidence" that was before the Director in the complaint hearings for Mr. Johnson and Mr. Vellaikamban in reaching the conclusion that Mr. Chand was acting as the Applicant's agent. BFPL asserts the Tribunal Member did not have a proper understanding of the relationship between BFPL and Mr. Chand and reached a conclusion that was "factually wrong".

26. BFPL says the Tribunal Member erred in deciding the conclusion of the Director on the complaints by Mr. Johnson and Mr. Vellaikamban that BFPL had not contravened section 21 of the *ESA* was unsupportable on the evidence.

27. BFPL submits this conclusion was not one that can be reasonably supported on a consideration of all of the evidence that related to the rent payments made Mr. Johnson and Mr. Vellaikamban.

28. The submissions of BFPL on the applications also allege the Tribunal Member erred in law in raising the application of section 95 of the *ESA* to the section 21 claims made by Mr. Johnson and Mr. Vellaikamban.

DO THESE APPLICATIONS WARRANT RECONSIDERATION?

29. We commence our analysis of these applications with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *ESA* reads:

> **116** (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
>
> (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.
>
> (2.1) The application may not be made more than 30 days after the date of the order or decision.
>
> (2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.
>
> (3) An application may be made only once with respect to the same order or decision.
>
> (4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.

30. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in section 2(b) is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST #RD046/01, the Tribunal explained the reasons for restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

31. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the

merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

32. The Tribunal has accepted an approach to applications for reconsideration that resolves itself into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not available to the original panel;
- inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

33. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised in the reconsideration.

34. We find these applications do not pass the first stage of the approach described in *Milan Holdings Inc.* and, accordingly, do not warrant reconsideration.

FINDINGS AND ANALYSIS

35. We are cognizant of and accept that findings of fact made by the Director command deference. We are also aware that the authority of the Tribunal over findings of fact is limited to those circumstances where the findings of fact amount to an error of law, either because the Director acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained.

36. As we will discuss in the next section of this decision, we find that while the Tribunal Member recognized there were facts in evidence that might have supported the Director's conclusion that BFPL did not contravene section 10 and section 21 of the *ESA*, for the reasons that follow, we agree completely with the Tribunal Member that the findings on these issues was not supported on an examination of all potentially relevant evidence or an assessment of the relative credibility of that evidence and, therefore, could not reasonably be viewed as supporting the conclusions reached in the Determinations.

37. It is trite that a failure by the Director to consider relevant evidence is an error of law.

38. As well, in *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal also considered the possibility that such a failure by the Director could constitute a breach of natural justice, which would be reviewable by the Tribunal under s. 112(1)(b). See also *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05 and *Flora Faqiri*, BC EST # D107/05. We only refer to this possibility to ensure completeness and to point out that while the Tribunal Member did not approach the section 10 and section 21 issues for a natural justice perspective, in our view, it was open for her to do so. On this latter point, we note that Mr. Johnson's and

Mr. Vellaikamban's appeals specifically argued that the Director's failure to consider all relevant evidence, particularly in relation to the section 10 and section 21 findings, constituted a breach of principles of natural justice. We note also that, in this context, a breach of natural justice is also an error of law.

39. Although the Tribunal should not lightly find there has been a failure to consider relevant evidence in making a determination, the Director of Employment Standards and her delegates have a duty, both under the *ESA* and at common law, to provide transparent and intelligible reasons for their determinations.

40. A conclusion on whether the Director failed to consider relevant evidence involves an assessment of both the Director's reasons and an analysis of the issues to which the evidence is relevant. Where the reasons provided demonstrate a failure by the Director to consider relevant and cogent evidence that leads to findings of fact that are not supported on the evidence considered by the Director or which do not reasonably support the conclusions reached, there is an error of law (and depending on the circumstances, a breach of natural justice) that justifies intervention.

41. With these comments, we now address the findings made by the Tribunal Member on the section 10 and section 21 issues.

The Section 10 Issue

42. The Director rejected both Mr. Johnson's and Mr. Vellaikamban's section 10 claims. In the original decisions, both claims were referred back "for a reconsideration of the relationship between the employer and Mr. Chand, on an expedited basis".

43. Section 10 of the *ESA* states, in part:

> **10** (1) A person must not request, charge or receive, directly or indirectly, from a person seeking employment a payment for
>
> (a) employing or obtaining employment for the person seeking employment, or
>
> (b) providing information about employers seeking employees.
>
> . . .
>
> (3) A payment received by a person in contravention of this section is deemed to be wages owing and this Act applies to the recovery of the payment.

Mr. Johnson's section 10 claim

44. According to the Director's summary of Mr. Johnson's evidence in the Determination, Mr. Johnson contended, in his original complaint and his oral evidence at the hearing, that he had been required to pay $7,685.58 in order to secure employment with BFPL, in three payments to Mr. Chand, of Chand & Company Law Corporation ("Chand & Company"), on August 2, 2016, June 3, 2017 and immediately after he arrived in Canada on July 5, 2017 (page R3). Mr. Chand is licensed to practice law in British Columbia and his law firm, Chand & Company, is named as the third party of BFPL on the LMIA, which is a document issued by the federal government authorizing an employer to hire a temporary foreign worker. According to Mr. Johnson's evidence, "Mr. Chand told him it would cost $10,000 US to obtain a job with BFPL, and that he obtained his visa and work permit on his own, without assistance from Mr. Chand" (page R8).

However, for the following reasons, the Director concluded that the fees Mr. Johnson paid to Mr. Chand were for immigration services and not for prohibited activity under section 10 (at pages R8 and R9):

> The documentation provided by Mr. Johnson includes a letter dated March 1, 2017, from Chand to the Canadian embassy in Abu Dhabi in which Mr. Chand indicates that he represented Mr. Johnson, and noting that he was submitting Mr. Johnson's application fee, work permit and visa applications, and some 20 additional forms in support of these applications. Mr. Johnson also provided electronic funds transfer documents indicating fee payments to Mr. Chand as Mr. Johnson's solicitor. While Mr. Johnson indicated that a relative had made the notes on the payments in error, I find it is more likely given the other documentation that Mr. Johnson utilised Mr. Chand's services as an immigration consultant. In an email dated May 4, 2016, and provided to Mr. Johnson, Mr. Chand indicated that Mr. Johnson needed to pay a $2,000 deposit with a balance of $8,000 due after Mr. Johnson's visa was issued; I find that this indicates that the fees were related to Mr. Chand's immigration services, not for providing information about BFPL's job openings. The Act does not prohibit immigration consultants from charging fees for immigration services, or regulate the fees charged. I find that Mr. Chand charged fees to Mr. Johnson for his immigration services and that these fees were not prohibited by section 10 of the Act. It is therefore unnecessary for me to determine if Mr. Chand was acting as BFPL's agent and if BFPL is responsible for charging fees.

45. In the original decision on Mr. Johnson, the Tribunal Member found that in concluding that the fees paid by Mr. Johnson to Mr. Chand were related to Mr. Chand's immigration services rather than for obtaining employment for Mr. Johnson, or for providing information about BFPL , the delegate acted on a view of the facts that cannot reasonably be entertained, and accordingly erred in law: See *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (B.C.C.A.).

46. The Tribunal Member made her decision based on the following observations taken from the evidence adduced by the parties at the hearing and before the Director:

- Mr. Johnson responded to an advertisement for employment with BFPL placed by Mr. Chand.
- The job advertisement indicated Mr. Chand was recruiting people for work in Canada.
- Mr. Chand, and not BFPL, interviewed Mr. Johnson. Nothing in the record suggests otherwise.
- BFPL's evidence was that Mr. Chand brought Mr. Johnson's resume to Shawn Grattan ("Mr. Grattan"), BFPL's Operations Manager (page R6).
- Mr. Grattan offered Mr. Johnson a position after reviewing the resume with Mr. Brink (page R6).
- Mr. Brink said that BFPL employs individuals like Mr. Chand to assist with finding candidates internationally and knew Mr. Chand for about four or five years (page R6).
- BFPL 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.
- The LMIA issued to BFPL was copied to Mr. Chand.

- Mr. Grattan acknowledged that Mr. Chand was listed as a third party on the LMIA documents, but it is unclear why BFPL did not engage Mr. Chand as a recruiter (which the Tribunal Member found to conflict with Mr. Brink's evidence that BFPL "had engaged Mr. Chand as a recruiter").
- In the recording of the telephone call between Mr. Johnson and Mr. Chand adduced by Mr. Johnson in the proceeding, Mr. Chand told Mr. Johnston that his employment was being terminated by BFPL because he had not paid the full amount of Mr. Chand's fees.
- In the same recording, Mr. Chand told Mr. Johnson "Come up with my money . . . and I will talk to Shawn" [presumably Mr. Gratton] and he further told Mr. Johnson, "Just so you know, I caused this. Because you didn't pay, this is what happened to you."
- Costina, who Mr. Johnson understood was a representative of BFPL, met with him at the airport when he arrived on July 5, 2017, spoke to him about the outstanding funds he owed to Mr. Chand and dropped him off at a house owned by Mr. Brink.

47. According to the Tribunal Member, the Director made no attempt to reconcile BFPL's evidence with Mr. Johnson's evidence that Mr. Chand informed him that he was paying to secure employment with BFPL. The Tribunal Member found that the telephone call between Mr. Chand and Mr. Johnson "is strongly suggestive of an arrangement between Mr. Chand and [BFPL] and corroborates [Mr. Johnson's] evidence". The Tribunal Member also found the Director made no attempt to identify why Costina would speak to Mr. Johnson about paying Mr. Chand's fees if the fees charged by Mr. Chand were between the latter and his clients.

48. We emphasize here that the Tribunal Member made a specific finding that the Director's conclusion on the section 10 issue relating to Mr. Johnson was one that, on the facts, could not reasonably be entertained since it was not based on a proper identification and assessment of all relevant evidence and, as such, constituted an error of law. The Tribunal Member referred this aspect of the Johnson Determination back to the "delegate" for a reconsideration of the relationship between BFPL and Mr. Chand, on an expedited basis. In the circumstances, subject to comments made later in this decision, we find the disposition of the section 10 issue by the Tribunal Member was appropriate.

49. We also consider it important that the Director failed to take any note of BFPL's failure to call Mr. Chand as a witness when they knew the section 10 claims were being advanced by both Mr. Johnson and Mr. Vellaikamban. Mr. Chand could have shed some light on the nature of his relationship with BFPL, himself and Costina. In our view, the Director ought to have addressed the implications of that failure and explained why an adverse inference should not have been made that would have allowed the evidence of both Mr. Johnson and Mr. Vellaikamban to be preferred over BFPL's on the nature of the fees, in whole or in part, paid by them to Mr. Chand.

50. We believe the Tribunal Member has persuasively identified the shortcomings in the Director's analysis and the resulting denial of Mr. Johnson's section 10 claim. On the evidence identified by the Tribunal Member in the original decision (as set out above), we agree the Director failed to discern the relationship between BFPL and Mr. Chand (and we would add the relationship of Costina with either or both of them) in adjudicating Mr. Johnson's section 10 claim and therefore, the Tribunal Member's order referring the

Determination back for reconsideration of the relationship between BFPL and Mr. Chand is entirely justified.

51. We also make the observation that the Director appears to have neglected to closely examine the letter of March 1, 2017, from Mr. Chand to the Canadian embassy in Abu Dhabi (the "Letter") which he refers to in his reasons for dismissing Mr. Johnson's section 10 claim. At page 3 of the Letter, Mr. Chand delineates a passage from the "support letter" for Mr. Johnson's visa from Mr. Grattan, who also serves as the HR Coordinating Manager of BFPL, that says:

> We offered Mr. Johnson a position with our company because of his experience, qualifications, and integrity. Mr. Johnson has several years of experience as a machine operator. He speaks English fluently and he has a history of compliance with the laws and policies of other countries, which is important for our organization. We understand that foreign workers in Canada must comply with strict terms and conditions. *We ensure each foreign worker we hire complies with Canadian immigration law by vetting each applicant for integrity and honesty, and by providing them with support in Canada. We work with a Canadian immigration law firm that provides resources to every foreign worker who works with our company* [Emphasis added].

52. While it is curious how BFPL could make <u>some</u> of the representations it does in the support letter about Mr. Johnson when the only person Mr. Johnson had met, as at the date of the Letter (on March 1, 2017) was Mr. Chand who interviewed him in Dubai, what is noteworthy and materially relevant to the section 10 claim of Mr. Johnson is BFPL's representation in the support letter that it ensures that each foreign worker they hire complies with Canadian immigration law by vetting each applicant for integrity and honesty. The Director did not discern who does the "vetting" for BFPL and who vetted Mr. Johnson for BFPL. The Director also did not discern what "support in Canada" was provided to Mr. Johnson by BFPL and who was involved in providing that "support" and on what terms. Further, also material to the section 10 claim, is the representation in the support letter that BFPL "work[s] with a Canadian immigration law firm that provides resources to every foreign worker who works with [BFPL]". Whether or not that firm is Mr. Chand's was never discerned by the Director at the hearing. Nor did the Director examine the terms on which Mr. Chand worked for BFPL. In our view, these are all material questions that go to the question of the relationship between BFPL and Mr. Chand; they were not considered by the Director in determining Mr. Johnston's section 10 claim because the Director felt it was "unnecessary for [him] to determine if Mr. Chand was acting as BFPL's agent". As the Tribunal Member obviously did, we disagree with the Director on that view. If it is not already clear, we consider that determination was not just necessary, but essential to a full and fair consideration of the section 10 claims made by both Mr. Johnson and Mr. Vellaikamban.

53. We also agree with the Tribunal Member that the recorded telephone call between Mr. Johnson and Mr. Chand, which formed part of the record in the proceedings, "is strongly suggestive of an arrangement between Mr. Chand and [BFPL] and corroborates [Mr. Johnson's] evidence". The Director, however, fails to consider the contents of the recording in his analysis of Mr. Johnson's section 10 claim. The telephone recording presents a distraught Mr. Johnson asking Mr. Chand's help to get his job back with BFPL after his employment was terminated by BFPL. Throughout the recording of 6 minutes and 22 seconds, Mr. Chand assertively demands payment of the fees he believes he is owed from Mr. Johnson. We agree with the Tribunal Member's perspective, recorded above, on that telephone call, particularly in the following statements Mr. Chand makes to Mr. Johnson:

- "I said to you what is going to happen; when I ask you for money and you do not pay, this is what happens to you";
- "You pay the money you owe me and I told you nothing would happen";
- "You had a chance, you had two chance [sic], you had three chance [sic] … in Canada we have a saying, three strikes you are out, right?
- "How many times did I ask you for my money? Don't worry about money now … we are going to get Shawn [Mr. Grattan] to book a ticket, you go home. Good luck for you in the future";
- Now, it is too late! You are finished! There is no need to talk about it. You could pay me before you go. Before you go, you pay to Shawn and you pay your full bill or you send it to me. It is not my concern. I warned you and you did not believe me. I will talk to Shawn if you pay me $6,500 … until then I say nothing;
- "I even said sign a document that you will pay me per month and you did not sign it. I told you sign the document then they will keep you on";
- Come up with my money - the full amount- I will talk to Shawn. No full amount, too bad!
- "Just so you know, I caused this. Just because you did not pay this is what happened to you";
- "There is only two people not paid … you and Balaji. Guess what happened to Balaji [Vellaikamban]? What happened to Balaji? Same thing. This what you guys deserve";
- "You come up with the money and then call me, before then don't call me. Bye, bye."

54. The Director completely fails to address the contents of the recording in his analysis of Mr. Johnson's section 10 claim.

55. While we recognize that, in the usual course, the Director of Employment Standards does not have to recite all of the evidence before her in her reasons for determination, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in her reasons. We note the words of Justice Near in *Karayel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1305, with respect to the applicability of this principle:

> [16] The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 1998 CanLII 8667 (FC), 157 FTR 35, 83 ACWS (3d) 264, for the proposition that the Board committed a reviewable error by not at least acknowledging evidence that contradicted its finding regarding the Applicant's credibility. Cepeda is a seminal case often cited on judicial review when the Board has come to a conclusion that differs from information contained in a piece of evidence submitted by the Applicant. In this particular context it is important to remember that the general principle to be distilled from Cepeda's evolution into an all-purpose documentary evidence citation is that **the more probative the evidence, the more likely the Court will find error when the Board ignores it** (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, 282 NR 394 at para 9). [Our emphasis in bold]

56. The evidence described above is, in our view, highly relevant and probative to the section 10 issue. While we appreciate that the Tribunal must give a significant degree of deference to the findings of fact made by the Director (see *Re Terra Nova Transcription Inc.*, 2020 BCEST 89 (CanLII), where findings of fact are

based on a failure to consider relevant evidence, it gives rise to an error of law and the findings need not be afforded deference (see *Whieldon v British Columbia College of Nurses and Midwives*, 2021 BCSC 1648 (CanLII)). In this case, the Director's findings on the section 10 claim cannot stand or be afforded deference, as the Director failed to consider clearly relevant evidence. We will note at this point that the foregoing comment also applies with equal force to the Determination for Mr. Vellaikamban.

57. We also find it noteworthy that Mr. Chand says in his email of February 28, 2017, to Mr. Johnson:

> I gave you two documents in Dubai.
>
> 1. Employment Contract. Sign last page.
> 2. Canadian support letter from the employer. No signature required.

58. This does not appear to have raised the Director's curiosity about why Mr. Chand would be providing the BFPL employment contract to Mr. Johnson before any employee of BFPL has had a chance to interview him for employment. Also, as indicated, the support letter for Mr. Johnson's visa from BFPL's HR Coordinator, referenced in the March 1, 2017 letter of Mr. Chand to the Canadian embassy in Abu Dhabi, was also presented to Mr. Johnson in Dubai by Mr. Chand. The support letter of BFPL speaks of Mr. Johnson and his character in glowing terms without ever meeting him. Only Mr. Chand had a chance to meet him as at that point. All of this should have raised a question of what the actual relationship was between Mr. Chand and BFPL, but it did not. The Director felt, wrongly in our view, it was "unnecessary for [him] to determine if Mr. Chand was acting as BFPL's agent and if BFPL is responsible for charging the fees".

59. In all of the circumstances delineated above, we find that the Tribunal Member's decision that the Director's conclusion on Mr. Johnson's section 10 claim cannot be reasonably entertained and, related to that conclusion, the decision referring the Determination back for reconsideration of the relationship between BFPL and Mr. Chand is entirely justified.

Mr. Vellaikamban's section 10 claim

60. Mr. Vellaikamban's section 10 claim, factually, resembles that of Mr. Johnson with a few differences. According to the delegate's summary of Mr. Vellaikamban's evidence in the Determination, Mr. Vellaikamban testified that "Mr. Chand told him it would cost $10,000 US obtain a job with BFPL, and that the charge was for LMIA, visa, and work permit" (page R7). In his initial complaint and his oral evidence, he said that he had paid "$8,000.00 US … to secure his job with BFPL, in four payments; the first presumably in 2016 in Dubai; the second to Chand & Company on May 17, 2017; the third to Chand & Company on June 30, 2017; and the final in cash to Costina upon arrival in Canada, presumably in early July 2017" (page R6). In the complaint document, he states he did not pay the final $2,000 USD after he was informed by Immigration Multicultural Services Society ("IMSS") that the "foreign workers recruitment fee to be paid by the employer and not the employee".

61. In dismissing Mr. Vellaikamban's section 10 claim and finding that Mr. Chand's fees were for immigration services, the delegate states (at pages R7 and R8):

> In the WhatsApp correspondence provided, in attempting to force Mr. Vellaikamban's payment of the fees on January 9, 2018, Mr. Chand states that normally immigrants pay $40,000 for a visa. There is no discussion in the WhatsApp correspondence to indicate that the services were even

> in part for providing information about the job with BFPL. Mr. Vellaikamban, as noted, indicate [sic] that he understood the services were for immigration documentation.
>
> I find that the above evidence indicates that the fees were related to Mr. Chand's immigration services, not for providing information about BFPL's job openings. …I find that Mr. Chand charged fees to Mr. Vellaikamban for his immigration services and that these fees were not prohibited by section 10 of the Act. It is therefore unnecessary for me to determine if Mr. Chand was acting as BFPL's agent and if BFPL is responsible for charging fees.

62. As in the case of Mr. Johnson, the Tribunal Member found that in concluding that the fees paid by Mr. Vellaikamban to Mr. Chand were related to Mr. Chand's immigration services rather than for obtaining employment for Mr. Vellaikamban, or for providing information about BFPL, the Director acted on a view of the facts that cannot reasonably be entertained. The Tribunal Member made her decision based on the following observations she made on the evidence adduced by the parties at the hearing and before the Director, many of which are similar to those summarized above in Mr. Johnson's case:

- Mr. Vellaikamban met with Mr. Chand in Dubai regarding the position with BFPL;
- Mr. Chand referred Mr. Vellaikamban to a position with BFPL;
- BFPL relied on third parties, including Chand & Company to find them potential candidates (foreign workers);
- No member of BFPL management interviewed Mr. Vellaikamban before he was offered employment with BFPL;
- Mr. Grattan, after reviewing the resume provided to him by Mr. Chand with Mr. Brink, offered the Mr. Vellaikamban a position;
- In the audio recording of Mr. Vellaikamban's telephone call with Mr. Chand, Mr. Chand told him that that he was still waiting for his final $2,000.00 USD payment which Mr. Vellaikamban was to pay to Costina;
- In the phone call, Mr. Chand stated to Mr. Vellaikamban that he worked for BFPL;
- The LMIA used for hiring Mr. Vellaikamban indicated that Mr. Chand was a third party for BFPL;
- One of the electronic funds transfers made by Mr. Vellaikamban to Mr. Chand contained a notation that the fee was for recruitment purposes.

63. As with Mr. Johnson's section 10 claim, the Tribunal Member identified the Director's omissions in assessing Mr. Vellaikamban's section 10 claim, namely:

> The delegate made no attempt to reconcile [BFPL'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 [BFPL], an additional $2,000.00 US towards Mr. Chand's fees.
>
> (Vellaikamban decision, para. 50)

64. The Tribunal Member also found the recorded telephone conversation between Mr. Chand and Mr. Vellaikamban, adduced in evidence by the latter and contained in the record, "is strongly suggestive of an arrangement between Mr. Chand and [BFPL] and corroborates the [Mr. Vellaikamban's] evidence." In the telephone recording, Mr. Chand admits that when he met Mr. Vellaikamban in Dubai, he told him "I worked for a company called Brink; then you got the job and I gave you the contract". He also said to Mr. Vellaikamban "I showed you the website. This is Brink".

65. As in the case of Mr. Johnson, there was a support letter written by Mr. Grattan dated December 9, 2016, in favour of Mr. Vellaikamban's visa application containing the same language as that set out above in Mr. Johnson's case. The same concerns and questions raised in Mr. Johnson's case arise in Mr. Vellaikamban's case.

66. As in Mr. Johnson's case, and for similar reasons, we find the decision of the Tribunal Member persuasive: that in concluding the fees paid by Mr. Vellaikamban 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 Director acted on a view of the facts that cannot reasonably be entertained.

67. We also agree with the Tribunal Member, that even if some of Mr. Chand's fees were for immigration services, there appears to be cogent evidence that supports the conclusion that part of the fees were for recruiting, and Mr. Chand was BFPL's agent in that regard.

68. In the result, as we did with Mr. Johnson's appeal of the section 10 claim, we find that it was entirely appropriate for the Tribunal Member to refer this aspect of the Determination on Mr. Vellaikamban back for consideration of the relationship between BFPL and Mr. Chand, on an expedited basis. To reiterate, the Tribunal Member made a specific finding that the Director's conclusion on the section 10 issue relating to Mr. Vellaikamban was one that, on the facts, could not reasonably be entertained since it was not based on a proper identification and assessment of all relevant evidence and, as such, constituted an error of law.

69. In our view, it would be wrong to decide the section 10 issue for either Mr. Johnson or Mr. Vellaikamban without a consideration of the relationship of BFPL to the other persons identified in this decision and in the original decisions – Mr. Chand, Mr. Brink as an individual, and Costina.

The Section 21 Issue

70. The Director rejected Mr. Johnson's and Mr. Vellaikamban's section 21 claims, both of which were in relation to $350 monthly rent payments apparently paid to Mr. Brink, BFPL's sole director and officer, rather than to BFPL directly. We say "apparently" because at least one rent payment was deducted from one of the complainant's wages by BFPL, at least two rent payments were paid to a person simply identified as "Costina", and no written tenancy agreements were ever produced in evidence. By way of the original decisions, both complainants' section 21 claims were referred back for "reconsideration on an expedited basis".

71. Section 21 of the *ESA* states:

> (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Mr. Johnson's section 21 claim

72. Mr. Johnson's section 21 claim concerns $2,300 in rent payments that he made during the course of his employment with BFPL. Mr. Johnson's evidence before the Director regarding this matter was as follows. Mr. Johnson, as is recounted in the Director's reasons (page R2), testified that he was "promised free rent but was charged $350 per month representing an indirect and unauthorized deduction from his wages". It appears that this promise was conveyed to him by Mr. Chand, but as is discussed below, the employment contract could equally be interpreted as obliging BFPL to provide housing at no cost, if BFPL actually provided accommodation (which, in turn, requires an evaluation of the true nature of Mr. Johnson's tenancy). Mr. Johnson arrived in Prince George in early July 2017 "and was met by a BFPL representative, 'Costina', … [who] dropped him off at a house owned by Mr. Brink" (page R4). The Director's reasons continue:

> Mr. Johnson's contract with BFPL had indicated that no accommodation would be provided, but that if it was, there would be no charge for it. Mr. Johnson stayed at this house with five or six other BFPL employees. For the first two months, he paid $350 in rent to Costina. He moved to a different house after two months, which was also owned by Mr. [John] Brink, and paid his rent to Mr. Brink directly from this point on. In total, Mr. Johnson paid $2,300 in rent during his employment. The accommodations provided were crowded and of poor quality; at first, Mr. Johnson did not even have a bed to sleep on.
>
> In the pay period which ended November 18, 2017, $350 was deducted from Mr. Johnson's paycheque for rent, but this was reimbursed to Mr. Johnson the next month as he had in fact paid his rent.

73. The section 112(5) record includes a corporate registry search, as of January 8, 2018, which shows that Mr. Brink is BFPL's sole director and officer (president/secretary). "Costina" is referred to in the Director's reasons, solely by what we presume to be a first name, on three separate occasions, each time identified solely as "Costina". Whatever Costina's relationship to BFPL, Mr. Brink, or to Mr. Chand (a lawyer and BFPL's "third party recruiter", who, as already noted, did not testify at the complaint hearing), may be, it is not identified in the Director's reasons. Costina did not testify at the complaint hearing. We are left to wonder, as was the Tribunal Member, about the precise relationship between Costina and one or more of BFPL, Mr. Brink, and Mr. Chand.

74. The Director made no detailed findings about Costina's relationship with BFPL or Mr. Brink, although at page R4 the Director referred to Costina as BFPL's "representative". The Director's reasons also seem to

imply that there was some sort of relationship between Costina and Mr. Chand since the former, upon picking up Mr. Johnson, "talked to him [Johnson] about the outstanding monies he owed to Mr. Chand". The evidence was that Costina picked up Mr. Johnson from the airport, which suggests she was an employee of BFPL, since BFPL arranged and paid for Mr. Johnson's transportation to Prince George. Costina drove Mr. Johnson to a house supposedly owned by Mr. Brink – this is not entirely clear in the evidence since Mr. Brink also testified that temporary foreign workers are accommodated "in Prince George in houses owned by Mr. Brink or BFPL" (Vellaikamban reasons, page R5).

75. In relation to the section 10 issue, the Tribunal Member observed that the Director failed to consider Mr. Johnson's evidence that he gave Costina rent money for the first two months. She further noted that if Costina were Mr. Brink's employee, it is unclear why she spoke to Mr. Johnson about paying fees to Mr. Chand. Alternatively, if she were an employee of BFPL, that supported a conclusion 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."

76. The record includes an employment contract that Mr. Johnson signed on January 3, 2017, at Baku, Azerbaijan. This contact was signed on behalf of BFPL by Mr. Gratton, described as BFPL's "HR Coordinating Manager", at Prince George on December 9, 2016. This contract was attached to a letter, dated December 9, 2016, submitted by Mr. Gratton to the Canadian Embassy in Abu Dhabi in support of Mr. Johnson's work permit and temporary resident visa application. Although Mr. Johnson did not sign the employment contract until January 3, 2017, Mr. Gratton, in his December 9, 2016, letter, states that Mr. Johnson "[has] accepted [BFPL's] offer of employment".

77. The employment contact, which appears to be a standard form contract of adhesion, is somewhat ambiguous with respect to the matter of accommodation. Paragraph 15 of the agreement reads as follows:

> **Accommodation**
>
> The EMPLOYER agrees to ensure that reasonable and proper accommodation is available for the EMPLOYEE, and shall provide the EMPLOYEE with suitable accommodation, if necessary. If accommodation is provided, the employer shall recoup costs as outlined below. Such costs shall not be more than is reasonable for accommodations of that type in the employment location.
>
> The EMPLOYER ______will/ X will not provide the EMPLOYEE with accommodation. (Mark X beside appropriate box)
>
> If yes, The EMPLOYER will recoup the costs at an amount of $ 0 per ____ (month, two-week period etc.) through payroll deductions.
>
> [*sic*]

78. The employment contract could be interpreted, *contra proferentem*, as not obliging BFPL to provide accommodation, but that if it did, there would be no cost. The evidence is clear that Mr. Brink purported, in his personal capacity, to provide accommodation, and that he purchased several houses near the BFPL mill for the specific purpose of accommodating BFPL temporary foreign workers (Director's reasons, page R6).

79. On the other hand, Mr. Johnson testified at his complaint hearing that he was "promised free rent but was charged $350 per month" (page R2). As previously noted, Mr. Brink testified that as a benefit to temporary foreign workers (such as Mr. Johnson), he had purchased several homes near to the BFPL mill that he rented to these workers "personally for minimal charges", and that Mr. Johnson was not required to live in one of his houses and "could have chosen to live elsewhere" (page R6). Mr. Brink further testified that "BFPL was not required to provide him [Mr. Johnson] with housing." That may or may not be so based on a *contra proferentem* interpretation of the agreement, but the employment contract also expressly stipulated that if accommodations *were* provided, there would be no charge to the employee.

80. The Director simply did not address this stark conflict in the evidence regarding the parties' differing positions regarding whether BFPL, through Mr. Chand or perhaps through the employment contract, represented that no-cost housing would be provided. The Director did not make any finding regarding whether BFPL, through Mr. Chand, actually promised to provide free rent to Mr. Johnson. Rather, the Director held that Mr. Brink was not legally prohibited from providing paid housing to BFPL employees, and that Mr. Johnson was not legally obliged to rent premises from Mr. Brink. However, to repeat, the Director did not make any finding regarding whether *BFPL* was obliged to provide "free rent" to Mr. Johnson, especially if, in fact or in law, BFPL was the actual landlord. Further, the Director did not make any finding regarding the relationship between Mr. Brink, as putative landlord, and BFPL, as employer, regarding the latter's alleged obligation to provide "free rent".

81. The Director, at page R11, referred to the employment contract, but did not purport to interpret it in light of the fact that it was a standard form contract of adhesion. The Director noted that there was no evidence of a written tenancy agreement (a written agreement is mandated by section 13(1) of the *Residential Tenancy Act*). Such an agreement might have provided clarity regarding who was the actual landlord. The Director simply concluded, without, in our view, a proper analysis of the evidence, that Mr. Brink was the landlord (and without considering whether Mr. Brink and BFPL might be characterized as a single employer for purposes of the *ESA*) and, accordingly, Mr. Johnson had nothing to complain about since BFPL never provided accommodation. This latter finding, of course, begs the central question – which the Director did not answer – regarding whether BFPL was obliged to provide no-cost housing based on the pre-hire representations allegedly made to Mr. Johnson by Mr. Chand, BFPL's third-party recruiter (see section 8 of the *ESA*), or based on a *contra proferentem* interpretation of paragraph 15 of the employment contract.

82. In the circumstances, we believe it was entirely appropriate for the Tribunal Member in the Johnson appeal decision to question the following matters:

i) why the Director did not make any finding regarding "Costina's" role in this matter;

ii) why the Director was prepared to treat Mr. Brink as being wholly separate and independent from BFPL, notwithstanding his status as that firm's sole director and officer, Mr. Brink's testimony that some houses were actually owed by BFPL, and Mr. Brink's testimony linking the provision of housing to BFPL's express desire to ensure that nearby housing was available for its temporary foreign workers;

iii) why the Director did not turn his mind to the one month's rent payment that was deducted by BFPL from Mr. Johnson's wages; and

iv) that although "Costina" accepted two months' rent from Mr. Johnson, the Director failed to clarify, or make any findings, regarding on whose behalf that rent money was tendered.

These concerns cry out for further investigation.

83. We find that the Tribunal Member's order, directing Mr. Johnson's section 21 claim to be reconsidered on an expedited basis, was entirely justified in the circumstances. In our view, the Director erred in law in finding that all of Mr. Johnson's rent payments were paid solely to Mr. Brink in his personal capacity, entirely unconnected to any obligation on the part of BFPL to provide rent-free accommodation, if accommodation was actually provided. By ignoring several key pieces of evidence (discussed above), and by failing to properly interpret the employment contract (in and of itself, an error of law), we are of the view that the Director's finding regarding the nature of the rent payments made, was based on a view of the facts that could not be reasonably entertained.

Mr. Vellaikamban's section 21 claim

84. Mr. Vellaikamban, also a temporary foreign worker, testified in his complaint hearing that "*BFPL* offered him housing when he arrived, and as he was new to Canada, and he did not know where else to stay he thought it would be best to accept the offered residence" (page R3) (our *italics*). Mr. Vellaikamban also testified that "he paid $350 per month by electronic transfer to John Brink, despite his contract indicating that employer provided housing would be at no cost" (page R3). It is not clear from the Vellaikamban Determination how much rent Mr. Vellaikamban actually paid to Mr. Brink and/or to BFPL.

85. Mr. Brink testified as follows (page R5):

> *Costina* assists TFWs with finding accommodation in Prince George in houses *owned by Mr. Brink or BFPL*. Normally Mr. Brink charges low market rent of $1,000 to $1,500 per month. Many TFWs choose to find housing on their own, which they are free to do. *Rent is never deducted from BFPL employees' pay*, *there is no connection between their employment and the rental*. Mr. Vellaikamban lived in a house owned by Mr. Brink and paid his rent to Mr. Brink directly. Mr. Vellaikamban did not sign a tenancy agreement with Mr. Brink. (our *italics*)

86. Four things should be noted regarding Mr. Brink's testimony. First, he appears to acknowledge that at least some homes are owned by BFPL, presumably to be made available to its employees. Second, although Mr. Brink testified that rent is never deducted from an employee's pay, that is precisely what occurred in Mr. Johnson's case (at least in regard to one month's rent payment). Third, "Costina" apparently acts as an agent, or some sort of "go-between", on behalf of Mr. Brink and/or BFPL, for the purpose of assisting BFPL's temporary foreign workers to secure accommodation in properties owned by either Mr. Brink or BFPL. Fourth, while Mr. Brink testified that there is "no connection" between the workers' employment with BFPL and their rental accommodations, "Costina" was seemingly engaged by BFPL to assist workers find housing (in properties owned by BFPL), and at least one worker had his rent payment deducted from his wages.

87. The Director's "reasons" for rejecting Mr. Vellaikamban's section 21 claim are identical (save for substituting "Vellaikamban" for "Johnson") to those set out in his reasons regarding Mr. Johnson's section 21 claim. Accordingly, the same concerns that we identified regarding the reasons in Mr. Johnson's case apply with equal force in relation to Mr. Vellaikamban's claim. It follows that we similarly find the Tribunal

Member's order, remitting Mr. Vellaikamban's claim for reconsideration on an expedited basis, to be entirely proper.

Section 95 of the *ESA*

88. Finally, and these observations apply to both Mr. Johnson's and Mr. Vellaikamban's section 21 claims, counsel for BFPL asserts that the Tribunal Member erred by applying "section 95 of the [*ESA*] in support of [her] determination that the Director erred in finding that [BFPL] and Mr. Brink were separate legal entities for the purposes of rental payments." Counsel for BFPL also asserts that the Tribunal Member "employed section 95 as a basis to find that Mr. Brink and [BFPL] ought to be treated as one entity for the purpose of rental payments without meeting the requisite criteria."

89. In our view, counsel's submission on this score fundamentally misstates the original decisions on this point; the Tribunal Member did *not* apply section 95 (the "associated – or common – employers" provision) in order to find that Mr. Brink and BFPL were a single employer for purposes of the *ESA*. Rather, the Tribunal Member simply observed, at para. 72 of the original decision for Mr. Johnson and para. 61 of the original decision for Mr. Vellaikamban, that this was a statutory provision that the Director probably should have considered in relation to the section 21 claims. The Tribunal Member did *not* make any final determination about the matter – she simply directed that the section 21 claims for Mr. Johnson and Mr. Vellaikamban be reconsidered. Certainly, in our view, the precise nature of the relationship between Mr. Brink and BFPL regarding the ownership of the properties in question, who actually received the rent, and who was the true landlord, needed to be explicated before any affirmative findings regarding section 21 could be made. The arguments counsel has advanced in these reconsideration applications with respect to section 95, and its possible relevance to the workers' section 21 claims, are arguments that should be directed to the Director's delegate who will be reviewing these claims as ordered by the Tribunal Member.

The Referral Back Order

90. It is not the function of a reconsideration panel to change an original decision unless the applicant can demonstrate some manifest error in it that justifies intervention and correction.

91. No error in the original decisions, or other circumstance that requires intervention, has been shown and we are completely satisfied the original decisions were correct.

92. Based on the material before the Tribunal Member, with one proviso, we completely endorse the disposition of the appeals by the Tribunal Member. The proviso we place on the disposition of the appeals addresses the order of the Tribunal Member to refer the section 10 and section 21 issues back to the "delegate" for reconsideration. Section 115(1) (b) of the *ESA*, allows the Tribunal to "refer the matter back to the director". "Director" is defined in section 1 of the *ESA* to mean "the Director of Employment Standards … and, in relation to a function, duty or power that the director has under section 117 of this Act delegated to another person, **"director"** includes that other person". While we will accept the delegate who had responsibility for the complaints made by Mr. Johnson and Mr. Vellaikamban and who issued the Determinations had the authority to do so, we cannot presume the Director will delegate the responsibility for complying with the orders of the Tribunal Member to the same person. Accordingly, we vary the order made by the Tribunal Member to read the section 10 and section 12 matters be referred back to the Director, as that term is defined in the *ESA*.

93. Having failed to show any error in the original decision, BFPL has failed to show any reason for exercising our discretion in favour of reconsideration.

94. These applications are denied.

ORDER

95. Pursuant to section 116 of the *ESA*, the original decisions, 2021 BCEST 104 and 2021 BCEST 105, except as varied immediately above, are confirmed.

David B. Stevenson **Panel Chair** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Member** **Employment Standards Tribunal**	**Shafik Bhalloo** **Member** **Employment Standards Tribunal**