

Citation: Adilis Josefina Gonzalez Marroquin et al. (Re)
2022 BCEST 28

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Adilis Josefina Gonzalez Marroquin, Astrid Priscila Chicol-Balam,
Gilberta Elizabeth Cuc Buch, Irma de Jesus Morales Anavisca,
Jeidy Azucena Beltran Varela, Milvian Alejandrina Quintanila-Damian,
Mirna Noelia Castillo Moran, Norma Cutzal-Cate, Sandra Leticia Cali-Salomon,
Sara Marinela Callejas-Quexel

(collectively, the “Group 2 – Individual Appellants”)

- and by -

Carolina Perez-Ramirez, Yoselina del Carmen Garcia-Arias,
Yosselin Fabiola Guevara-Retana

(collectively, the “Group 3 – Individual Appellants”)

- 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: Kenneth Wm. Thornicroft

FILE NOS.: 2022/077 – 2022/089

DATE OF DECISION: May 25, 2022

DECISION

SUBMISSIONS

Raul Gatica	on behalf of Dignidad Migrante Society representing the Group 2 – Individual Appellants and the Group 3 – Individual Appellants (see Appendix A)
Suzan El-Khatib	counsel for GERI Partnership, comprised of the partners Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, and Lewis and Harris Trust Management Ltd., carrying on business as Golden Eagle Farms
Jordan Hogeweide	delegate of the Director of Employment Standards

INTRODUCTION

1. The present appeal proceedings arise from a “referral back” order I issued on July 24, 2020 (see *Aquilini et al.*, 2020 BCEST 90; the “Appeal Decision”). This referral back order resulted in the determination, dated December 24, 2021, that is now before me (the “2021 Determination”). The 2021 Determination was issued under section 79 of the *Employment Standards Act* (the “ESA”) by Jordan Hogeweide, a delegate of the Director of Employment Standards (the “second delegate”).
2. These reasons for decision address a narrow question, namely, whether any of the individuals identified in Appendix A to these reasons have standing to appeal the 2021 Determination. There are presently 59 individuals who have filed appeals of the 2021 Determination, all of whom are represented by the Dignidad Migrante Society (“Dignidad”). In order to manage these appeals, the Tribunal has placed these appellants into four separate groups (Groups 1 to 4). These reasons address only the appeals filed by Group 2 (ten individuals; Tribunal File Numbers 2022/077 – 2022/086) and Group 3 (three individuals; Tribunal File Numbers 2022/087 – 2022/089). These individuals are identified in Appendix A to these reasons.

THE 2021 DETERMINATION

3. Pursuant to the 2021 Determination, 28 individuals, all farm workers, were awarded a total amount of \$15,044.80, representing unpaid regular wages (\$13,131.33), vacation pay (\$525.25), and section 88 interest. These individuals are named in a separate “Wage Summary Sheet” which are appended to the 2021 Determination. In addition to the 28 individuals who were awarded wages, the 2021 Determination also identified, in the same “Wage Summary Sheets”, 24 other individuals who were not awarded any wages.
4. The 2021 Determination was issued against an entity identified as the “GERI Partnership”, consisting of the following individuals and corporations: Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, and Lewis and Harris Trust Management Ltd.

carrying on business as Golden Eagle Farms. I shall refer to these latter parties collectively as the “Employer”.

5. Further, and also by way of the 2021 Determination, the second delegate levied a single \$500.00 monetary penalty against the Employer (see section 98 of the *ESA*) based on its contravention of section 17 of the *ESA* (failure to pay wages earned in a pay period). Accordingly, the Employer’s total liability under the 2021 Determination is \$15,544.80.
6. I will briefly summarize the prior proceedings in this matter in order to provide the necessary context underlying the current appeal proceedings and the “standing” issue.

THE 2019 DETERMINATION

7. On May 13, 2019, a delegate of the Director of Employment Standards (not the same delegate who issued the 2021 Determination; the “first delegate”) issued a determination with respect to 185 employees, all farm workers. I shall refer to this determination as the “2019 Determination”. The 2019 Determination was issued following an investigation that appears to have been triggered by a written complaint filed by Dignidad on behalf of 12 identified individuals, and a second written complaint, filed by the British Columbia Federation of Labour, on behalf of 170 unidentified individuals. Ultimately, the first delegate held that 174 of the employees were entitled to unpaid wages, and the remaining 11 employees were not owed any wages.
8. The 2019 Determination ordered the Employer (the same parties as were named in the 2021 Determination) to pay 174 individuals a total sum of \$133,737.87 on account of unpaid wages, representing regular wages (\$126,569.00), vacation pay (\$5,062.76), and section 88 interest (\$2,106.11). By way of the 2019 Determination, the Employer was also assessed a \$500.00 monetary penalty for having contravened section 8 of the *ESA* (false representations). The unpaid wage award reflected work undertaken in the latter part of 2018 and was based on a “self-audit” conducted by the Employer, as directed by the first delegate.
9. The Employer appealed the 2019 Determination, as did Dignidad on behalf of 52 of the 185 individuals who were named in that determination. Of the 52 appellant employees, nine were included in the group of twelve employees that were listed in the original Dignidad complaint (the other three original complainants never appealed the Determination). In addition, Dignidad represented 61 individuals who were responding to the Employer’s appeal. Two other individuals responded to the Employer’s appeal on their own behalf (see 2021 Determination, page R6).
10. With respect to the Employer’s appeal, I held that the first delegate complied with section 77 of the *ESA* in the course of investigating the various employees’ unpaid wage claims. I was also satisfied that the first delegate correctly interpreted these employees’ employment contacts and, in particular, that “the Employer was under a contractual duty to provide 40 hours of paid work each week” (Appeal Decision, para. 116). I cancelled the \$500.00 monetary penalty – that had been issued based on a section 8 contravention – but referred this issue, and the possibility of a further section 79(2) “make whole” remedy, back to the Director of Employment Standards (see section 115(1)(b) of the *ESA*).

11. With respect to the employees' appeals, I dismissed various grounds of appeal that were advanced, but were not properly before the Tribunal (see Appeal Decision, paras. 166-168). As for the issues that were properly before the Tribunal, I held that the first delegate correctly determined that: i) there was no statutory obligation requiring him to issue multiple monetary penalties (Appeal Decision, para. 174); ii) the Employer was not bound by a contractual promise to provide each employee with a minimum of 6 months' paid employment (Appeal Decision, para. 194); and iii) the Employer did not contravene section 10 of the *ESA* (unlawful hiring fees; Appeal Decision, para. 196).
12. However, I was satisfied that the first delegate failed to observe the principles of natural justice in making the 2019 Determination and, accordingly, I issued a section 115(1)(b) "referral back" order with respect to the 52 employees who appealed this latter determination (Appeal Decision, para. 230).
13. Finally, I confirmed the unpaid wage orders (or orders that no wages were owed) that were issued regarding the 133 former employees who did not appeal the 2019 Determination (Appeal Decision, para. 228), and cancelled the balance of the 2019 Determination (Appeal Decision, para. 229).
14. The Appeal Decision was not the subject of a section 116 application for reconsideration – not by any employee, not by the Employer, and not by the Director of Employment Standards. That being the case, the Appeal Decision stands as a final order. The 2021 Determination was issued in specific response to the referral back order issued with respect to the 52 appellant employees who challenged the 2019 Determination (those employees were listed in Appendix B of the Appeal Decision).
15. In the Appeal Decision, I did not restrict the referral back order such that the Director's review would be limited to the *ESA* entitlements of the 52 appellant employees, although I did direct that the Director's review should, "at a minimum", consider the rights and entitlements of those 52 individuals.
16. The second delegate ultimately determined "that only those 52 appellant-employees listed under Appendix B of the [Appeal Decision] have outstanding issues to be addressed in this determination", and that "[t]he remaining employees who did not appeal the [2019 Determination] have had their potential entitlements finally adjudicated" (2021 Determination, pages R6-R7).

THE STANDING ISSUE

17. As noted at the outset, these reasons for decision address whether the individuals within Group 2 and Group 3 have standing to appeal the 2021 Determination.
18. The ten individuals in Group 2 were among the 185 individuals whose *ESA* entitlements, if any, were addressed in the 2019 Determination. All of the ten Group 2 individuals were employees who were awarded wages under that determination, and none of them appealed the 2019 Determination or applied to extend the appeal period. None of these employees ever applied for reconsideration of the Appeal Decision that was issued with respect to the 2019 Determination (even assuming, without deciding, that they would have had a right to do so). Finally, their unpaid wage entitlements were confirmed by the Appeal Decision which, as noted above, now stands as a final order regarding these employees.
19. None of the three individuals included in Group 3 was named in the 2019 Determination, and were similarly not named in the 2021 Determination. None of these individuals ever filed an unpaid wage

complaint under section 74 of the *ESA*, and the section 74 limitation periods governing the filing of a complaint by any of these individuals (6 months from the last day of employment) have now expired. None of these employees was included in the group of 52 employees that Dignidad represented in the appeal of the 2019 Determination.

20. The second delegate's position is that none of the Group 2 or Group 3 individuals is entitled to appeal the 2021 Determination. The second delegate's submission regarding each of the Group 2 and Group 3 individuals is essentially the same.

21. With respect to Group 2 individuals, the second delegate says:

None of these 10 employees filed complaints with the Employment Standards Branch, however they were included in the Branch's director-initiated investigation of 185 employees of GERI Partnership who worked at the farm in the summer of 2018. The 10 employees in Group 2 were named in the determination issued by the Employment Standards Branch on May 13, 2019, but none of the employees appealed the determination and none responded to GERI Partnership's appeal of the determination. The Director of Employment Standard's *[sic]* position is that these employees' potential entitlements under the Employment Standards Act for their work in 2018 have been finally adjudicated. As such, they were not named in the determination issued December 24, 2021, and do not have standing to appeal the determination to the Employment Standards Tribunal.

22. With respect to the Group 3 individuals, the second delegate says:

None of the three employees in Group 3 filed complaints with the Employment Standards Branch and they were not included in the Branch's director-initiated investigation of a large group of employees of GERI Partnership who worked at the farm in the summer of 2018. As such, they were not named in the determinations issued by the Branch on May 13, 2019, and December 24, 2021. The Director of Employment Standard's position is that they do not have standing to appeal to the Employment Standards Tribunal.

23. Similarly, the Employer submits that none of the Group 2 or Group 3 individuals has standing to appeal. With respect to the Group 2 individuals, the Employer says:

The Respondent submits that Group 2 – Individual Appellants not named in the 2021 Determination but named in the 2019 Determination should not have standing to file appeal *[sic]*. The deadline to file an appeal to the 2019 Determination was June 20, 2019. There is no evidence or explanation as to why these individuals failed to file an appeal by such date or in the nearly three years such date *[sic]*. For the Tribunal to grant standing to these individuals would not only be contrary to the principles of natural justice, it would be an abuse of process and would set a precedent whereby the foundation of the laws, regulations, orders and rules upon which the employer, the employees and Director can rely upon would crumble due to lack of certainty. One of the purposes of the *[ESA]* as set out in section 2(d) is "to provide fair and efficient procedures for resolving disputes". That purpose would be contravened by granting standing to these individuals.

24. With respect to the Group 3 individuals, the Employer says:
- The individuals have not particularized their respective claims, if any, against the [Employer]. Further, there is no evidence or explanation as to why these individuals have not sought to adjudicate their alleged claims within the parameters and timelines of the [ESA]. For the Tribunal to grant standing to these individuals would not only be contrary to the principles of natural justice, it would be an abuse of process and would set a precedent whereby the foundation of the laws, regulations, orders and rules upon which the employer, the employees and Director can rely upon would crumble due to lack of certainty. One of the purposes of the [ESA] set out in section 2(d) is “to provide fair and efficient procedures for resolving disputes”. That purpose would be contravened by granting standing to these individuals.
25. Dignidad, who is representing the Group 2 and Group 3 individuals, filed a common submission on behalf of the individuals in both Groups. This submission notes that some of these individuals face certain barriers in terms of accessing their rights under the *ESA*, including the fact that they are temporary foreign workers with a limited understanding of the *ESA*, and are not proficient in the English language. Dignidad, while conceding that none of these individuals ever filed a complaint, nonetheless maintains that these individuals have rights and entitlements under the *ESA* that have never been adjudicated. However, Dignidad’s submission regarding what rights and entitlements the Group 2 and Group 3 individuals may have under the *ESA* is not relevant to the issue at hand, namely, their right to appeal the 2021 Determination.
26. With respect to this latter question, Dignidad notes that by way of the Appeal Decision, the Director could have adjudicated their claims – but did not do so. The Appeal Decision directed that, “at a minimum”, the Director of Employment Standards consider the rights and entitlements under the *ESA* of the 52 appellant employees, and thus the Director could have expanded the review beyond only a consideration of the rights of those latter employees.
27. Dignidad concedes that none of the Group 2 or Group 3 individuals was “mentioned by name at the determination” [*sic*], but nonetheless maintains that these individuals “are part of the whole determination” (presumably, because the referral back order was not necessarily restricted to the 52 appellant employees). Dignidad thus asserts: “So it is not true that after three years those [Group 2 and Group 3 temporary foreign workers] didn’t participate in the complaint and appeal.”
28. Dignidad further maintains that the Group 2 and Group 3 individuals were always intended to be included in the original appeal proceedings because Dignidad’s “submission...mentioned that any benefit for those that we represent must include the rest of all the workers” [*sic*]. Dignidad’s submission continues:
- ...the ESB officer who in his total bias on the employer side said that none of them filed a complaint with the ESB. That’s a risky affirmation because the whole complaint was made also as a third party complaint, which means that it includes all the workers. So the inclusion in the whole investigation wasn’t a favor from the ESB officer, because we had mentioned that claim as a third party complaint as well.
- Of course because of the ESB officer bias in favor of the employer, he wants none of those workers to get any benefit, that’s why for him it has finally been adjudicated. However, if the [temporary foreign workers] want to participate in the appeal, it is because they truly believe that what they

got is not what they deserve. So all the workers, not just those from group 2, must be considered granted the right to receive any benefit that we win, and let anyone be part of the appeal process.

To conclude, the deep concept of Justice will be damaged to don't granting any kind of participation of those [temporary foreign workers] from group 2 and 3 in this process. So we hope that the [Tribunal] could consider the whole particularities of this case to grant the participation of any affected [temporary foreign workers].

[sic]

FINDINGS AND ANALYSIS

29. As detailed in the Appeal Decision, the original Dignidad complaint was filed on behalf of 12 identified individuals. The brief unparticularized complaint filed by the British Columbia Federation of Labour mentioned 170 employees, but none was specifically identified. As noted in the 2021 Determination (page R6): “After receiving these complaints, the [Employment Standards] Branch decided to use its discretion to initiate a broader investigation of [the Employer], which encompassed an additional 173 employees on top of the twelve complainants.” The British Columbia Federation of Labour was not involved in any material fashion in the first delegate’s original investigation, nor was it involved in the subsequent appeal proceedings. The 2019 Determination, as previously noted, addressed the *ESA* entitlements of 185 employees – all of whom were named in “Appendix A” to that determination.
30. Dignidad appealed the 2019 Determination on behalf of 52 of the 185 employees named in that Determination – nine of whom were named in the original Dignidad complaint. Although the Director of Employment Standards conceded that there had been a breach of the principles of natural justice with respect to the nine employees named in the original Dignidad complaint, the Director argued that the remaining 43 employees had no standing to appeal because they were not named in the 2019 Determination, and were not served with a copy of it (Appeal Decision, para. 181).
31. Section 81(1) of the *ESA* states that the Director of Employment Standards must serve a copy of a determination on any person named in it. Section 112(1) states that “a person served with a determination” is entitled to appeal that determination. I held that these provisions must be interpreted such that even if a person was not actually served with a copy of a determination, if that person was “named” in the determination (and thus should have been served), they are entitled to appeal it (Appeal Decision, para. 216).
32. Accordingly, since there had been a breach of the principles of natural justice with respect to all 52 appellants, not merely the original complainants, I issued the following “referral back” order with respect to those individuals (Appeal Decision, para. 230):
- Pursuant to section 115(1)(b) of the *ESA*, I am referring the claims of the 52 employees who appealed the Determination back to the Director. I am not issuing any directions regarding how the Director shall proceed. The Director has the discretionary authority to either conduct a new investigation, or to hold an oral evidentiary hearing. The Director must not restrict the scope of any new investigation or hearing solely to the rights and entitlements of the 12 employees originally identified in the Dignidad complaint. Any new investigation or hearing shall, at a minimum, allow for a consideration of the rights and entitlements under the *ESA* of the 52 employees represented by Dignidad in the Dignidad appeal.

33. None of the Group 2 or Group 3 individuals were directly captured by this order. Although all of the Group 2 employees were named in the 2019 Determination (and all of them were awarded wages under that determination), none of them appealed, or even attempted to appeal, the 2019 Determination on their own behalf, and none was included within the group of 52 employees that Dignidad represented in the appeal proceedings. As for the Group 3 individuals, none was named in the 2019 Determination, and none purported to appeal that determination, either in their own right or through Dignidad.
34. While Dignidad correctly notes that my referral back order did not strictly limit the Director of Employment Standards' new investigation or hearing to a consideration of the *ESA* entitlements of the 52 appellant employees, I did not direct that any new investigation or hearing must consider the rights and entitlements of other employees not within the "appellant" group.
35. The second delegate was well aware that Dignidad was pressing the interests of a broader group of employees, not just the 52 appellants (see 2021 Determination, page R4: "[Dignidad argues that the] Employment standards claims are still at issue for more than just the 52 workers who appealed the previous determination"). However, the second delegate limited the scope of what turned out to be a reinvestigation, rather than a new hearing, as follows (2021 Determination, pages R6-R7):
- ...the issue of section 8 misrepresentation [see Appeal Decision, paras. 201-203] will be reexamined with respect to the 63 employees who responded to [the Employer's] appeal. However, for the remainder of the issues besides section 8 misrepresentation, I find that only those 52 appellant-employees listed under Appendix B of the Tribunal's appeal decision have outstanding issues to be addressed in this determination. The remaining employees who did not appeal the previous [2019 Determination] have had their potential entitlements fully adjudicated.
36. The second delegate was not obliged to consider the rights and entitlements of employees other than those of the 52 appellant employees. By way of the Appeal Decision, I did *not* order the Director of Employment Standards to enquire into the possible rights and entitlements of those employees who were named in the 2019 Determination, but did not appeal it. I reject, unequivocally, Dignidad's wholly unfounded assertion that the second delegate was "biased" because he did not expand his review beyond the 52 appellant employees. The second delegate was not obliged to do so, and his decision to refuse to entertain the possible *ESA* rights and entitlements of the Group 2 employees who, firstly, never filed unpaid wage complaints, and then, secondly, never challenged their entitlements as fixed by the 2019 Determination, can hardly be characterized as unreasonable.
37. Insofar as the Group 3 employees are concerned, none ever filed a complaint, and these individuals were not named in the 2019 Determination because, it appears, they never actually worked for the Employer during the relevant time frame (this fact appears to be conceded in Dignidad's April 26, 2022 submission to the Tribunal: "...when they arrived [at the farm] it was no work for them" [*sic*]).
38. None of the Group 2 or Group 3 employees has ever filed an application to extend either the complaint period (see *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553), or the appeal period (see section 109(1)(b) of the *ESA*). None ever applied for reconsideration of the Appeal Decision.
39. Notwithstanding that none of the Group 2 or Group 3 employees ever filed an unpaid wage complaint, the first delegate expanded the scope of his investigation beyond the possible entitlements of the original 12 complainants, relying on what was then section 76(2) of the *ESA* ("The director may conduct an

investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint”). Under section 76(1.4) of the current *ESA*, the Director continues to have the authority to investigate the possible *ESA* entitlements of non-complainants. This expanded investigation resulted in the 2019 Determination, and a finding that 174 of the 185 employees who worked at the farm during the relevant time frame were entitled to additional wages.

40. Only 52 employees appealed the 2019 Determination. In the Appeal Decision, I rejected the Director of Employment Standards’ position that non-complainants had no standing to appeal because they were not “named” in the 2019 Determination (see Appeal Decision, paras. 208 and 212). Thus, my referral back order was in relation to the possible *ESA* entitlements of all 52 appellant employees. All of the 185 employees identified in Appendix B of the 2019 Determination could have appealed that determination, but only 52 did so.
41. It should be remembered that the Tribunal is an *appeal* body, and does not make original determinations with respect to a person’s entitlements or obligations under the *ESA*. The Tribunal’s role is to review the correctness of determinations issued by the Director of Employment Standards and the fundamental fairness of the process followed regarding the issuance of such determinations.
42. As noted above, my referral back order did not require the Director of Employment Standards to consider the possible *ESA* entitlements of the employees who were either awarded or denied wages in the 2019 Determination, but who never appealed that determination. My order specifically confirmed the 2019 Determination with respect to the *ESA* entitlements, if any, of those employees (see Appeal Decision, para. 228). The Appeal Decision was never the subject of a section 116 reconsideration application, and thus it stands as a final order with respect to the 133 employees who never appealed the 2019 Determination.
43. None of the Group 2 employees has ever filed an application to extend the time for appealing the 2019 Determination and, even if such an application were made at this very late juncture (about three years after the 2019 Determination was issued), such an application would be virtually certain to fail.
44. None of the Group 3 employees ever filed a complaint, and none was included in the wider audit conducted by the first delegate, since none actually worked for the Employer during the material time frame. Since they were not named in the 2019 Determination, the Group 3 employees did not have any standing to appeal the 2019 Determination, and since they were similarly not named in the 2021 Determination, they do not have any standing to appeal that latter determination.
45. I am satisfied that none of the Group 2 or Group 3 employees has the requisite standing to appeal the 2021 Determination. I am also satisfied that the Tribunal does not have the statutory authority to adjudicate their appeals, and if the Tribunal were to consider these appeals, that would constitute an abuse of process.
46. Insofar as the Group 2 employees are concerned, the 2019 Determination of their rights and entitlements stands as a final order, and their present appeals of the 2021 Determination constitute impermissible collateral attacks on the 2019 Determination and the Appeal Decision (see *British Columbia (Workers’ Compensation Board) v. Figliola*, [2011] 3 SCR 422).

47. In light of these considerations, the appeals filed by the Group 2 and Group 3 employees must be dismissed.

ORDER

48. Pursuant to subsections 114(1)(a), (c) and (g) of the *ESA*, each of the appeals filed by the Group 2 and Group 3 individuals is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Appendix A: Appellant Listing

Group 2 – Individual Appellants

Individuals not named in the 2021 Determination [named in the 2019 Determination]

Appellant Name	Tribunal File Number
Adilis Josefina Gonzalez Marroquin	2022/077
Astrid Priscila Chicol-Balam	2022/078
Gilberta Elizabeth Cuc Buch	2022/079
Irma de Jesus Morales Anavisca	2022/080
Jeidy Azucena Beltran Varela	2022/081
Milvian Alejandrina Quintanila-Damian	2022/082
Mirna Noelia Castillo Moran	2022/083
Norma Cutzal-Cate	2022/084
Sandra Leticia Cali-Salomon	2022/085
Sara Marinela Callejas-Quexel	2022/086

Group 3 – Individual Appellants

Individuals not named in the 2021 Determination [not named in the 2019 Determination]

Appellant Name	Tribunal File Number
Yoselina del Carmen Garcia-Arias	2022/087
Carolina Perez-Ramirez	2022/088
Yosselin Fabiola Guevara-Retana	2022/089