Citation: Noj-Patricio et al. (Re)
2022 BCEST 44

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Angela Mercedes Noj-Patricio, Arceli Lopez Jaco, Blanca Iris Garcia Lopez, Celeste Noemi Siquinajay-Juarez, Deysi Corina Martinez-Bernal, Dinora Patricia Aquino-Garcia, Edi Mariested Ramirez-Salazar, Elida Carmencita Xetey-Loch, Elida Luz Salazar y Salazar, Eliezer Manuel Flores-Espina, Elsa Maely Lima-Revolorio, Eufemia Adelaida Baten-Ramos, Fredi Orlando Valdez-Ramirez, Gilber Donain Estrada-Mazariegos, Gladis Odilia Perobal-Mutzutz, Glenda Yaneth Lima-Revolorio, Gloria Maribel Suy-Hernandez, Gricelda Azucena Sandoval-Calderon, Herminia Gamboa-Cesareo, Iris Yaneth Vela-Leiva, Jeniffer Susana Medrano-Molina, Jesica Celeste Castillo-Jorquin, Maria Amalia Itzol-Chicop, Maria Arminda Lopez-Arreaga, Maria del Carmen Saz-Yucute, Maria Cristina Sutuj-Solano, Maria Luisa Cobox-Cutzal, Mario Alfredo Donado-Castro, Marlin Yohana Lopez-Juarez, Milvia Yesenia Saba-Ramirez, Mirsa Amarilis Martinez-Bernal, Nereida Yesenia Guevara-Rodriguez, Nury Maritza Sisimit-Yojero, Olga Noj-Patricio, Reina Victoria Balam-Morales, Reyna Esmeralda Tala-Vasquez, Sandra Veronica Lopez-Barrera, Teresa Garcia-Pinzon, Wendy Roxana Lorenzana-Salazar, Yeison Mersai de Paz, Alex Arnoldo Estrada-Escobar, Delmy Alejandra Alonzo-Moreno, Milton Erasmo Giron Godoy

(collectively, the “Group 1 – Individual Appellants” or the “appellant employees”)

- 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
TRIBUNAL FILE NOS.:	2022/007, 013 – 051, 054, 056, 066
DATE OF DECISION:	July 07, 2022

DECISION

SUBMISSIONS

Raul Gatica	on behalf of Dignidad Migrante Society representing the Group 1 – 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") in accordance with the provisions of section 115(1)(b) of the *Employment Standards Act* (the "*ESA*"). 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 *ESA* by Jordan Hogeweide, a delegate of the Director of Employment Standards (the "second delegate").

2. 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".

3. The Appeal Decision concerned an earlier determination, dated May 13, 2019 (the "2019 Determination"), also issued against the various entities that constitute the Employer. The 2019 Determination was appealed to the Tribunal, resulting in the Appeal Decision pursuant to which certain matters were referred back to the Director of Employment Standards. This referral back order resulted in the 2021 Determination which, in turn, is the subject of the present appeal proceedings.

4. The 2021 Determination, as noted above, was issued on December 24, 2021 and sent, by electronic mail, that same day to the Dignidad Migrante Society ("Dignidad") – the organization that has been representing the appellant employees (and others) from the outset of this matter (the two initiating complaints were submitted to the Employment Standards Branch in September 2018). On February 9, 2022, the second delegate issued a corrected version of the 2021 Determination. The corrections solely concerned some minor misspellings of some of the employees' names. In all other respects, the corrected 2021 Determination was identical to the earlier version of the document. The second delegate's short February 9th e-mail to Dignidad reads as follows:

> It was brought to my attention that I misspelled some of the employee names in the determination issued on December 24, 2021, with respect to the above noted matter. The attached corrigendum should correct these mistakes. The corrections in the corrigendum are underlined in red type. Pursuant to section 123 of the Employment Standards Act, these technical irregularities do no [*sic*] invalidate the proceeding under the Act.

5. By way of the 2021 Determination, the Employer was ordered to pay 28 individuals, all farm workers as well as being temporary foreign workers, a total amount of $15,044.80, representing unpaid regular wages ($13,131.33), vacation pay ($525.25), and section 88 interest ($1,388.22). These 28 individuals are each named in a separate "Wage Summary Sheet", all which are appended to the Determination. In addition to the 28 individuals who were awarded wages, the 2021 Determination also identified, in separate Wage Summary Sheets, 24 other individuals who were not awarded any wages. Further, and also by way of the 2021 Determination, the second delegate levied a single $500.00 monetary penalty against the Employer 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 Determination is $15,544.80.

6. Insofar as these appeal proceedings are concerned, on February 4, 2022, Dignidad filed an omnibus Appeal Form with the Tribunal on behalf of "61 Temporary Foreign Workers from Guatemala". As part of the appeal management process, the Tribunal placed these 61 individuals (ultimately, Dignidad obtained written authorizations to represent 59 of these individuals) into four separate groups (Groups 1 to 4). The Group 1 individuals were named in both the 2019 and 2021 Determinations; the Group 2 individuals were named in the 2019 Determination, but not in the 2021 Determination; the Group 3 individuals were not named in either the 2019 Determination or the 2021 Determination; and the Group 4 individuals were named in the 2019 Determination but not in the 2021 Determination.

7. *These reasons address only the appeals filed on behalf of the Group 1 appellants* (43 individuals, listed in Appendix A). In an earlier decision, issued on May 25, 2022 (2022 BCEST 28), I adjudicated the appeals filed on behalf of the Group 2 (ten individuals) and Group 3 (three individuals) appellants. By letter dated May 16, 2022, the Tribunal advised Dignidad that the Tribunal had closed its files relating to the three Group 4 individuals. These appeal files were closed because the appellants, despite specific directions from the Tribunal, failed to submit completed requisite appeal documents, and written submissions justifying extending the applicable appeal periods, within the time period fixed for filing these documents and submissions.

8. With respect to the Group 1 employees' appeal now before me, Dignidad alleges that the second delegate erred in law and failed to observe the principles of natural justice in making the 2021 Determination (see subsections 112(1)(a) and (b) of the *ESA*). Dignidad also says that it now has relevant evidence that was not previously available (subsection 112(1)(c) of the *ESA*).

9. This appeal was not filed within the statutory appeal period (see section 112(3) of the *ESA*) and, accordingly, the appellants seek an extension of the appeal period pursuant to section 109(1)(b). I will address the appellants' section 109(1)(b) application later on in these reasons. However, before addressing the instant appeal and the section 109(1)(b) application, I believe it would be helpful to summarize the prior proceedings, including both the 2019 and 2021 Determinations, and the 2021 Appeal Decision and "referral back" order.

PRIOR PROCEEDINGS

The 2019 Determination

10. 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 the 2019 Determination, which concerned the *ESA* entitlements of 185 employees, all farm workers. 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 named in the 2019 Determination were entitled to unpaid wages, and the remaining 11 employees were not owed any wages.

11. 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.

The Appeal Decision (2020 BCEST 90)

12. 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).

13. 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, and that the first delegate correctly interpreted their employment contacts. In particular, I held 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*).

14. With respect to the employees' appeals, I dismissed several grounds of appeal that were advanced, but were not properly before the Tribunal (see Appeal Decision, paras. 166 to 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).

15. 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).

16. 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).

17. Accordingly, by way of the Appeal Decision, I confirmed certain findings set out in the 2019 Determination, including the first delegate's finding that the Employer did not contravene section 10 of the *ESA*, as well as the first delegate's interpretation and application of the employees' employment contracts, and the wage determinations for the 133 employees who did not appeal the 2019 Determination. I cancelled the balance of the 2019 Determination. The "referral back" order was as follows (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.

The 2021 Determination

18. The 2021 Determination and the second delegate's "Reasons for the Determination" (the "second delegate's reasons") were issued on December 24, 2021.

19. As detailed in the second delegate's reasons (at pages R2-R3), he initially issued a determination in this matter on December 7, 2021, but this determination was cancelled one week later pursuant to section 86(1) of the *ESA* because it "contained errors in the wage calculations for the employees". The record shows that the second delegate communicated with the parties advising that he had used an incorrect minimum wage figure, and had also misread some of the payroll records. He directed the parties to provide further submissions regarding the wage calculations for some employees who were not available for work during certain weeks. I understand that the 2021 Determination was largely identical to the cancelled December 7th determination save for the unpaid wage calculations. As noted above, by way of the 2021 Determination, the Employer was ordered to pay a total amount of $15,044.80 to 28 former employees. The second delegate did not award any wages to 24 other individuals who were also named in the 2021 Determination.

20. The second delegate's reasons summarize the history of these proceedings (as discussed above), and also addressed some preliminary matters.

21. First, as is set out at paras. 10-11 of the Appeal Decision, the Employer, although seeking to have the 2019 Determination cancelled, nonetheless requested that the wages determined to be owing should be paid to the employees in question. With respect to these monies, the second delegate noted, at page R3 of his reasons: "It was agreed [between the second delegate and Dignidad's representative] that the gross

wages of $133,737.87 paid by [the Employer] in satisfaction of the [2019] determination and held in trust by the [Employment Standards] Branch should be paid to the workers as soon as possible." I understand that the Director was holding – since May 17, 2019 – $116,465.55 in trust representing the wages due under the 2019 Determination less statutory deductions (see Appeal Decision, para. 11; see also the second delegate's reasons, page R6: "[The Employer] accepted the Tribunal's finding in this regard [i.e., the interpretation of the employees' wage bargain set out in their employment contracts] and agreed that the funds it paid to the [Employment Standards] Branch in satisfaction of the previous determination should be disbursed to the workers as soon as possible.") I understand that the wages awarded to employees under the 2019 Determination have now been paid to them. The further amounts awarded to employees under the 2021 Determination were paid to the Director of Employment Standards on or about January 20, 2022.

22. Second and third, during the referral back process, Dignidad raised concerns about the deduction of private medical insurance premiums and income tax deductions (see Appeal Decision, para. 198). The second delegate's reasons note, at page R4:

> In the complaint form and in subsequent communication, Mr. Gatica of Dignidad advanced two claims with respect to improper deductions from the workers' wages: private medical insurance premiums and income tax. As will be explained again below, [the Employer] acknowledged that the medical insurance premiums should not have been deducted from the workers' wages. [The Employer] provided pay records to confirm that it returned this money to the workers by direct deposit into their bank accounts on October 12, 2018. With respect to income tax, again, this is a matter within the jurisdiction of the [Canadian Revenue Agency]. None of the employees provided evidence to show that income tax deductions (or CPP or EI deductions) were contrary to the Employment Standards Act. Accordingly, the workers' pay stubs are unnecessary to resolve the outstanding disputes between the parties.
>
> (see also page R17 regarding the medical insurance premiums and income tax deductions)

23. Fourth, the second delegate restricted his examination of any further wage entitlements (other than in relation to section 8 of the *ESA*) to "only those 52 appellant-employees listed under Appendix B of the Tribunal's appeal decision [who] have outstanding issues to be addressed in this determination [while] [t]he remaining employees who did not appeal the [2019 Determination] have had their potential entitlements finally adjudicated" (second delegate's reasons, pages R6-R7).

24. Fifth, the second delegate did not investigate various matters raised by Dignidad during the "referral back" process because they had previously been determined in the Appeal Decision, or were otherwise not properly before the second delegate (see page R7):

- whether the Employer contravened section 10 of the *ESA* ("The Tribunal held this allegation was properly addressed in the [2019 Determination] and is no longer at issue");
- whether the employees worked "excessive hours" (see section 39) – the second delegate determined that Dignidad's allegations in this regard "fall under the jurisdiction of WorkSafeBC rather than the Employment Standards Branch"; and
- whether the employees are entitled to statutory holiday pay (Part 5 of the *ESA*) – "Not only was statutory holiday pay not at issue in the appeal, according to section 34.1 of the Employment Standards Regulation, 'Part 4, except section 39, and Part 5 of the Act do not

> apply to farm workers.' There is no dispute that the employees in question were 'farm workers' as defined in the Employment Standards Regulation."

25. As set out in the 2021 Determination, the second delegate investigated and made findings regarding the following matters: i) possible compensation for retaliation (section 83); ii) minimum 40 hours of pay per week (see Appeal Decision, paras. 116, 118, and 132); iii) unauthorized wage deductions (section 21); and iv) overtime pay (section 40).

26. With respect to section 83, the second delegate reviewed statements provided by 15 of the employees regarding alleged bullying, harassment, threats and intimidation by some of the Employer's managers, allegations that were generally, but not entirely, denied by the Employer. The second delegate's findings regarding section 83 are as follows (second delegate's reasons, pages R13-R14):

> After considering these statements and the many other statements on the file, I find it more likely than not that one or more of [the Employer's] managers made threats towards the workers. By [the Employer's] own evidence, threatening behaviour was not uncommon at the farm. Mr. Olano's [the farm's general manager] forthright evidence is that the "lower class" supervisors did not follow the rules, which in context I take to mean these supervisors did not follow appropriate workplace norms in dealing with the workers. Mr. Olano was frustrated with the behavior of his subordinate mangers towards the workers. These lower lever [*sic*] supervisors included Esteban, Avtar, Silvano, and, in particular, Tony (Antonio Ballesteros). [The Employer] denies that Tony was a manager at the farm. Tony provided a statement that he was just a regular farm worker. Regardless of Tony's formal position or title, it is clear from the evidence that he had some authority over the workers, or at least was perceived as having authority over them. He was a longer-term worker, was male (when the majority of other workers were female), was responsible for transporting the workers, and acted as a translator between the workers and [the Employer]. In an interview with a WorkSafeBC officer, [the Employer] responded to a question about threats and intimidation. The notes of [the Employer's] response say, "employer became aware of some of Tony's actions and took away his responsibility for transporting workers to hospital or town and be a translator."
>
> One or more of these lower managers threatened some of the workers with fewer hours or being sent home to Guatemala. I am not satisfied, however, that these threats were actually carried out. I agree with [the Employer] that the evidence does not show conclusively [the Employer] gave the workers in question fewer hours or sent them home earlier than the many other workers at the farm. [The Employer's] calculations show that these workers worked just as many hours as other employees, if not more. By my own count more than 70% of the 185 Guatemalan workers who were included in the initial investigation had left the farm or were sent home around the same time as the complainants or earlier. By then the picking season, which had been poor because of the weather, was over, and only a few dozen workers were kept on for pruning and other work. [The Employer] may have selected these workers for many different reasons without offending the Employment Standards Act. But the evidence does not establish that the complainants were deliberately excluded from the group that stayed on for longer specifically because of the potential involvement of the Employment Standards Branch.
>
> Nonetheless I am satisfied that the threats themselves could amount to prohibited conduct if they were motivated by the direct or potential involvement of the Employment Standards Branch.

27. Notwithstanding the second delegate's conclusion that at least some of the workers were subjected to threats, bullying and harassment, the delegate concluded that there were no section 83 contraventions. The second delegate was satisfied that the Employer was not aware of any actual or potential *ESA* complaints before September 21, 2018, which was the date an Employment Standards Branch officer first contacted the Employer. By this date, "the complainants had already left the farm with the help of Dignidad, so even if the managers were made aware of the Branch's investigation, it is very unlikely they would have been able to retaliate against these workers" and "[t]he workers' evidence is that the threats were made toward them while they were at the farm, and there is no evidence to show that threats continued after they left" (second delegate's reasons, page R14).

28. Section 83 may be contravened if retaliatory behaviour was motivated by an actual complaint, or by a *potential* complaint or investigation. In relation to the latter circumstance, the second delegate found that while many of the employees' complaints concerned matters outside the purview of the *ESA*, "many workers also raised concerns about their wages, which falls squarely within the jurisdiction of [the *ESA*]" (page R14). The second delegate also noted that several employees met with a Dignidad representative in August and September 2018, and that the Employer was aware (and not very pleased about) these meetings (pages R14-15). Nevertheless, the second delegate ultimately determined that the Employer never contravened section 83 (at page R15):

> Still, just because an employer is aware that workers have engaged an advocate to pursue employment grievances does not necessarily mean the employer is aware of the "potential" involvement of the Employment Standards Branch. There needs to be an indication that the Branch has been or will be contacted about alleged contraventions of the Act. The evidence in this case does not establish that Dignidad or any of the workers informed [the Employer] of their intention to file complaints with Branch before actually doing so on September 16, 2018. The evidence also does not establish that any of the managers who made threats to the workers anticipated, or ought to have anticipated, that the Branch would become involved. Accordingly, I am not satisfied that threats made by [the Employer's] managers were motivated by direct or potential involvement under the Act contrary to section 83.

29. In the Appeal Decision, I held that the employees were entitled under their employment contracts to be paid for at least 40 hours of work each week. The second delegate noted that the records of hours worked provided by Dignidad were "largely consistent with the records provided by [the Employer]" (page R16). These records were used to calculate the employees' additional unpaid wage entitlements. However, some employees arrived at, or departed from, the farm mid-week, thus complicating the wage entitlement calculations for workers who were not paid for 40 hours of work in those weeks. The Employer paid its employees based on a Saturday to Friday work week, and the second delegate's calculations were based on the following guidelines (page R17): "workers who arrived on either a Saturday, Sunday, or Monday are entitled to the 40-hour weekly top-up [and] workers who departed on either Wednesday, Thursday, or Friday are entitled to the 40-hour weekly top-up". The second delegate considered this approach to be a "reasonable, practical, and consistent" method of calculation, particularly since it was "consistent with how [the Employer] paid many of the workers who arrived or departed mid-week" (page R17).

30. In the Appeal Decision, I cancelled the first delegate's finding that the Employer had contravened section 8, and referred this issue back to the Director "to be considered anew by way of a process that affords

both the Employer and the employees a reasonable opportunity to present their respective evidence and argument" (para. 159). The second delegate reconsidered the issue, determining that there was no section 8 contravention (page R18):

> Since the appeal decision was issued, Dignidad has offered no further evidence than what was before the Tribunal regarding what [the Employer] may have represented to the employees. Some of the employee statements on the file do refer to a man in Guatemala named Henry who recruited the workers to work for [the Employer]. They allege Henry charged them expensive fees for his services, but there is no evidence of any specific misrepresentations of the availability and terms of employment, beyond the standard-form written employment contract, which the Tribunal held was insufficient to establish misrepresentation. Moreover, besides the alleged misrepresentation with respect to the 40-hour per week minimum (which the appeal decision rectified) and the 6-month security of tenure (which the appeal decision held was properly rejected), Dignidad has not identified exactly what other terms of employment [the Employer] may have misrepresented. [The Employer] did not misrepresent the availability of the work (the work was in fact available), the type of work (farm work on a berry farm), or the wages (except for the piece-rate incident, which was corrected, the workers were paid an hourly minimum wage). Based on all of the evidence on the file, I cannot identify any other terms of employment that [the Employer] may have potentially misrepresented. According [sic] I find no breach of section 8 of the Act.

31. The final issue addressed in the 2021 Determination was whether the employees, despite being "farm workers" (and thus excluded from the *ESA* overtime provisions – see *Employment Standards Regulation*, section 34.1), had a *contractual* claim to overtime. The second delegate rejected this claim, finding (correctly, in my view), that there was no evidence supporting a contractual basis for the payment of overtime pay (page R19).

THE REASONS FOR APPEAL

32. As previously noted, Dignidad, on behalf of the 43 "Group 1" employees, appeals the 2021 Determination on all three statutory grounds – "error of law", "natural justice" and "new evidence".

33. Dignidad says that the second delegate erred in calculating the appellant employees' further unpaid wage entitlements. Among other things, Dignidad says that the employees "were always on call to go to work", and that the second delegate never took this state of affairs into account.

34. Dignidad says that the second delegate erred in law in restricting his investigation to the *ESA* entitlements of the 52 employees who appealed the 2019 Determination. As noted above, the delegate decided not to address the possible *ESA* entitlements of other employees that Dignidad represented (these employees were named in, but never appealed, the 2019 Determination) because "their potential entitlements [had been] finally adjudicated" (second delegate's reasons, page R7). Dignidad's submission on this point, set out below, could be more properly characterized as concerning a breach of those individuals' "natural justice" rights:

> The most limited officer can understand that it means that it is not limited to the 52 workers [Note: this comment refers to my referral back order, which stated: "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."]; however, [the second

> delegate] decided not to include the 9 that DIGNIDAD also represents … With his action [the second delegate] denied the right to those workers to participate in a fair process. It means that [the second delegate] in order to totally support [the Employer] also breached the principles of natural justice when he failed to hear, request, or investigate what those 9 employees had to say, because they weren't even considered by [the second delegate] as beneficiaries of the EST decision.

35. However, this issue – whether characterized as one concerning "natural justice" or an error of law – is not properly before the Tribunal in these proceedings. As discussed in the Group 2 and Group 3 "standing" decision (see 2022 BCEST 28), the Group 2 employees' claims were finally determined by way of the Appeal Decision, and none of the Group 2 or Group 3 individuals has any standing to appeal the 2021 Determination.

36. Dignidad further says that the second delegate erred in law in determining:

- that there was no section 8 contravention; and
- that the employees' contracts "[did] not include guarantee of duration of employment", and that this interpretation "contravenes the whole meaning of a Contract". [Note: this matter was finally adjudicated in the Appeal Decision, at paras. 191-194, and thus was not a matter that could be revisited in the referral back investigation.]

37. Some of Dignidad's "error of law" assertions more properly fall under the "natural justice" ground of appeal (and vice versa). In particular, Dignidad says that the second delegate, during the course of the referral back investigative process, "expressed his nuisance against the [employees] and his bias into [the Employer's] side, and put a lot of obstacles for providing us information, but not to share information to other who were not involved in the case" [*sic*]. Dignidad says that the second delegate was "biased" against the employees and "didn't even act with fairness principles to give us an opportunity to reply to evidence that has been submitted by the employer." Dignidad says that the second delegate's bias is evidenced by his refusal to receive and consider documents that he characterized to be irrelevant:

> It doesn't matter if the evidence are or not relevant to the [Employment Standards Branch] eyes, [the second delegate] never should avoid receiving it. He could receive it, review it and then decide if those documents or evidence were important or not. But he can't just say that those are irrelevant or unnecessary without seeing and analyzing them. It is not fair that a decision maker decided that evidence that he didn't see are irrelevants. [*sic*] It just shows bias in favor of the employer, because avoiding that worker present [*sic*] evidence, or refusing to contact them directly will only protect the employer and deny access to justice to the workers.

38. Dignidad says that the second delegate failed to observe the principles of natural justice because "he denied us the opportunity to provide evidence to Section 32, 34, 63 and 64." I should note, at this juncture, that these issues were not properly before the second delegate, and are not now properly before the Tribunal. These issues were addressed in the Appeal Decision, at paras. 166-167. To reiterate what I held in that decision: "Since the section 32, section 34, section 63, and section 64 claims were never advanced in Dignidad's (or in the BC Fed's) original complaint, and thus never adjudicated, those matters are not properly before me in these appeals".

39. In a similar vein, Dignidad wishes to reopen the matter of whether the Employer contravened section 10 ("No charge for hiring or providing information"). This matter was addressed in the 2019 Determination, the delegate holding that there was no such contravention. I specifically confirmed this finding in the Appeal Decision (see para. 228). Accordingly, the second delegate properly determined that this claim was "no longer at issue" (page R7).

40. Dignidad's final "natural justice" argument concerns the delegate's treatment of section 83. Dignidad says that the second delegate breached the principles of natural justice in his treatment of the employees' section 83 claims.

41. The "new evidence" that Dignidad now submits concerns its claims under sections 8 and 10. As noted above, the section 10 issue has been finally adjudicated. If Dignidad was of the view that I erred in the Appeal Decision by confirming the first delegate's decision that the Employer did not contravene section 10, its remedy was to apply for reconsideration of the Appeal Decision under section 116 of the *ESA*. No party ever applied for reconsideration, and the Appeal Decision now stands as a final order with respect to the section 10 issue. That being the case, none of the evidence tendered with respect to an alleged section 10 contravention is relevant to this appeal.

42. I should add that my comment about Dignidad's failure to apply for reconsideration applies with equal force to its present attempt to advance section 32, 34, 63 and 64 claims – all of which were rejected in the Appeal Decision.

43. Returning to Dignidad's "new evidence" ground of appeal, none of the evidence now proffered with respect to an alleged section 8 contravention (false representations), is admissible under the *Davies et al.*, BC EST # D171/03, framework. Most of these documents are dated in 2018, with some others dated in 2019. Other, more recently created, documents are simply not relevant to the issues properly before me – for example, online newspaper/magazine articles; WorkSafeBC correspondence and other related documents; and documents concerning the workers' on-site accommodations. As the Tribunal has repeatedly stressed, evidence that was available and could have (and, perhaps, should have) been presented to the Director during the course of an investigation is not admissible on appeal. An appeal of a determination is not a *de novo* hearing in which an appellant is entitled to buttress, and otherwise rehabilitate, the case that should have been presented to the Director. While I have not detailed the various documents that Dignidad has tendered, I have reviewed all of them, and do not consider that any meets the *Davies* test for admissibility on appeal.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

44. The 2021 Determination includes, at page D3, a text box headed "Appeal Information". Among other things, this text box advises that an appeal of the 2021 Determination must be filed with the Tribunal "by 4:30 pm on January 17, 2022" (this date was highlighted in yellow text). Apart from this direction, Dignidad should have been well aware of the *ESA*'s appeal deadlines since its appeal of the 2019 Determination was late, necessitating a section 109(1)(b) application to extend the appeal period (which was granted – see Appeal Decision, para. 61).

45. The section 112(5) record shows that the 2021 Determination was served on Dignidad – as the appellants' representative – by electronic mail on December 24, 2021. Dignidad's first communication with the

Tribunal was on January 24, 2022, one week after the statutory appeal period expired, and one month after the 2021 Determination was actually served on Dignidad. Dignidad's January 24th communication was an e-mail, consisting of one paragraph, in which Raul Gatica ("Mr. Gatica"; the Dignidad representative who has represented the appellants throughout this entire matter) stated: "As the workers disagree with [the 2021 Determination] they will appeal it." Mr. Gatica requested an extension to January 28, 2022 to submit the requisite appeal documents, explaining that "because the amount of work that Dignidad had providing help to [temporary foreign workers] affected by the flooding in Abbotsford and Chilliwack and also por the time that it took to made the consultation among the workers that we represent, the time to submit an appeal to the Employment Standard tribunal wasn't enough to finish the appeal on January 17" [*sic*]. Mr. Gatica also stated that he mistakenly thought he had until January 27, 2022 to submit the appeal.

46. On January 28, 2022, Mr. Gatica sent a second e-mail to the Tribunal seeking a further extension to February 4, 2022, since "this case is very complex and needs a lot of review of thousands of pages and submission in order to don't lose anything important." [*sic*] On February 4, 2022, Dignidad filed its Appeal Form and written argument supporting its grounds of appeal (summarized, above).

Dignidad's Section 109(1)(b) Submission

47. In support of its section 109(1)(b) application to extend the appeal period, Dignidad asks the Tribunal to consider that it is a volunteer organization that is "all the time swamped by requests of help across the province and across the country." Mr. Gatica, for Dignidad, says that his energies were focused on dealing with the fallout from various provincial emergencies such as the heat wave and flooding, the latter which particularly affected the Fraser Valley, and that "it definitely distracted us to put attention to the deadline of the appeal".

48. Mr. Gatica also says that he was confused by the issuance of a corrected version of the 2021 Determination on February 9, 2022 (this document corrected some minor spelling errors of some employees' names), stating: "We were also confused with the cancellation of the first determination and we realized that the deadline ended four days after it." It should be noted that the corrected 2021 Determination was, in all material respects save for some misspelled names, identical to the earlier version and did not, in any way, purport to "cancel" the prior document.

49. Finally, Dignidad asserts:

> We also have problem to contact the worker [*sic*] that we represent in order to inform them about the determination, analyze it and ask if they wanted to submit an appeal and get their signatures for representation, and
>
> The complexity of the case demanded a lot of review of what document [*sic*] we had, and also as the determination was made without a number paragraph and without concrete citation, it made it more complicated to confirm what the ESB officer said.

The Director's and Employer's Replies

50. The Tribunal, commencing with its decision in *Niemisto*, BC EST # D099/96, has consistently considered several criteria when deciding if an appeal period should be extended. These criteria include: whether the delay in question is unreasonably lengthy; whether there is a reasonable and credible explanation for failing to file a timely appeal; has the appellant had an ongoing intention to appeal that was made known to the other parties, including the Director of Employment Standards; whether a party will be unduly prejudiced if the appeal period were extended; and whether the appellant has presumptively credible arguments supporting its grounds of appeal. Dignidad did not specifically address all of the *Niemisto* factors in its submission, although its submission does speak to why it failed to file a timely appeal.

51. The Director of Employment Standards does not oppose Dignidad's application to extend the appeal period. The Director says that the appellant employees (unlike the Group 2 and 3 individuals) have standing to appeal, and that "given the relatively short extension requested", and there being "no indication" that an extension would prejudice the Employer, the Director has no objection to extending the appeal period.

52. The Employer opposes Dignidad's application. The Employer says that the appellant employees have not provided a reasonable and credible explanation for their failure to file a timely appeal. The Employer says that the circumstances advanced in support of the application uniquely concern Dignidad, rather than the individual employees. The Employer notes that the flooding in the Fraser Valley occurred in November and early December 2021, and that even if Dignidad was assisting other temporary foreign workers, that does not explain why the individual appellants were unable to file timely appeals.

53. The Employer says that Dignidad's assertions about its time-consuming efforts dealing with matters other than preparing the requisite appeal documents are wholly uncorroborated. The Employer says that, in fact, Dignidad has had more than sufficient time to file a timely appeal when one considers that the December 7, 2021 determination was issued and then cancelled about 2 weeks prior to the issuance of the 2021 Determination:

> … Dignidad has not advised the Tribunal whom it contacted, by what method it contacted each of the Appellants, when it attempted to contact each Appellant and when it received instructions from each of the Appellants. Further, the original Determination was issued on December 7, 2021. As previously stated, the December 24th Determination did not vary substantively the decision on its merits with respect to many issues, including misrepresentation. Presumably, Dignidad would have initiated attempts to contact the Appellants after the December 7, 2021 Determination. Further, there is no evidence whatsoever as to when Dignidad began working on the appeal submission. If one Appellant provided instructions to Dignidad to commence an appeal, Dignidad presumably would have commenced its efforts at that point. …
>
> With respect to the statutory time limit being insufficient, Dignidad had the benefit of the December 7, 2021 determination with an appeal deadline of December 31, 2021 and thus, by virtue of the cancellation and re-issuance, was granted an additional time period.

54. The Employer notes that Dignidad did not contact the Tribunal about a possible appeal until after the appeal deadline had expired, and that Dignidad never contacted the Employer regarding its intention to

file an appeal. The Employer says that it did not learn about the appeal until it was contacted by the second delegate on February 3, 2022.

55. Finally, the Employer says that the appeal lacks any *prima facie* merit. In particular, the Employer says that the bulk of Dignidad's submissions addresses "irrelevant facts" and does not provide any factual foundation for its bias allegation against the second delegate. The Employer also says that Dignidad's "error of law" and "new evidence" grounds of appeal are not meritorious:

> In regard to an error of law, the Appellants suggest that the wage calculations were in error; yet, submit no evidence, aside from one comparison, to set out what the correct calculation is with respect to each worker.
>
> In respect of new evidence that has become available, there are allegations that there is new evidence but the evidence was not submitted and further, there is no indication of why that evidence was not available from the outset of even the 2019 Determination when that evidence clearly would be in the possession of the workers.

ANALYSIS AND FINDINGS

56. Dignidad filed its appeal on February 4, 2022, about 2 ½ weeks after the statutory appeal period expired. Thus, the delay involved in this matter is not particularly lengthy. However, Dignidad did not contact the Tribunal about a possible appeal until one week after the appeal period had already expired. Although Dignidad indicated in its January 24, 2022 e-mail to the Tribunal that it would "submit the appeal no later than this week ending on January 28, 2022", it did not do so, and on that latter date sought a further extension to February 4th (when its appeal was actually filed). It should also be noted that this is the second time that Dignidad failed to file a timely appeal (see Appeal Decision, para. 42).

57. I am also mindful of the fact that the second delegate issued an earlier determination on December 7, 2021 that I understand was, in many respects, largely identical to the 2021 Determination that is now before me. Thus, at least with respect to several of the issues raised in Dignidad's appeal, it had even more time to prepare its appeal documents.

58. I am not satisfied that Dignidad has adequately explained why it did not file a timely appeal. The issues that were to be addressed in the referral back process were clearly delineated in the Appeal Decision. Dignidad was entitled to, and did, file submissions regarding those matters with the second delegate. That being the case, I am unable to appreciate why it would not have been a relatively straightforward matter to review the 2021 Determination, and prepare an appeal submission with respect to any alleged errors contained within it prior to the January 17, 2022 appeal deadline. Although Dignidad did not inform the Employer of its intention to appeal the 2021 Determination, I am not satisfied that the Employer has suffered any distinct prejudice flowing from Dignidad's failure to file a timely appeal.

59. In light of the above considerations, Dignidad has not presented a particularly compelling case in favour of extending the appeal period. Leaving aside any consideration of the presumptive merits of Dignidad's appeal, the case in favour of extending the appeal deadline is, at best, borderline. However, another important consideration is the *prima facie* merit of the appeal. And in this regard, I am satisfied that even if this appeal were allowed to proceed, it has no reasonable prospect of succeeding and, thus, in any event, must be dismissed under section 114(1)(f) of the *ESA*.

60. Dignidad's appeal is based on all three statutory grounds. As discussed above, none of Dignidad's "new evidence" (all of which was available when the 2021 Determination was being made) is admissible in light of the *Davies et al.* criteria.

61. Several other arguments that Dignidad now advances are not properly before the Tribunal because these issues have been finally adjudicated, and were not included among the matters that were referred back to the Director of Employment Standards. For example, Dignidad says that it ought to have been allowed to argue that the Employer contravened sections 10, 32, 34, 63 and 64 of the *ESA*, and that the delegate erred in refusing to make new findings regarding these *ESA* provisions. However, as discussed above, Dignidad's assertions regarding these provisions are not properly before the Tribunal. In the Appeal Decision, I confirmed the first delegate's determination that there was no section 10 contravention (see para. 228), and this issue was not included in my referral back order. Similarly, the second delegate did not err by refusing to address Dignidad's section 32, 34, 63, and 64 claims, since these claims were finally adjudicated in the Appeal Decision (paras. 166-167).

62. Dignidad says that the second delegate erred in law in several distinct ways, none of which I find to be meritorious. Dignidad says that the second delegate's additional unpaid wage calculations are incorrect, but has not provided any compelling argument that such was the case. In this regard, the second delegate's unpaid wage calculations reflect precisely what he was tasked to do by way of the referral back order. The second delegate examined the payroll records (and, in this regard, "the [payroll] records provided by the workers are largely consistent with the records provided by [the Employer]") and then awarded wages to those employees who did not receive at least 40 hours of paid work per week.

63. Dignidad now says that the second delegate failed to take into account the fact that the employees were "always on call to go to work". This is an entirely new argument that was not advanced during the original appeal, and was not an issue that was included in my referral back order. Further, and in any event, this "on call" argument is simply asserted, and there is no evidence whatsoever to support it. In particular, there is no evidence that the Employer required the employees to be on call at a designated location. Further, even if there is a designated location, employees are not deemed to be at work if that location is their residence.

64. Dignidad says that the second delegate erred in law by limiting his investigation to the additional unpaid wages that might be owed to the 52 appellant employees (Group 1). As noted above, in 2022 BCEST 28, issued on May 25, 2022, I addressed the claims of the Group 2 and Group 3 individuals. The Group 2 employees' claims were finally determined by way of the Appeal Decision, and none of the Group 2 or Group 3 individuals has any standing to appeal the 2021 Determination.

65. Dignidad says that the second delegate erred in his treatment of its section 8 claim. As was the case with its additional wage entitlement/calculation argument, Dignidad's submission regarding section 8 essentially amounts to a mere assertion of error, made without providing any cogent evidence or argument to support it. The second delegate's reasoning on this point, at page R16, clearly sets out why he rejected the section 8 claim, and I am not persuaded that he made a palpable and overriding error in so doing (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

66. Dignidad continues to maintain that the employees' employment contracts guaranteed them a minimum period of employment – in the original appeal, Dignidad argued that the employees had a 6-month

guarantee of employment. I previously rejected this argument (Appeal Decision, paras. 193-194), and it was not an issue that was included in my referral back order. If Dignidad believed that I erred in rejecting its position on this issue, it should have applied to have the Appeal Decision reconsidered under section 116. Having failed to do so, the Appeal Decision regarding this issue now stands as a final order and, as such, cannot be revisited in this appeal.

67. Dignidad says that the second delegate breached the principles of natural justice because he was "biased" against the employees, and because he failed to properly consider Dignidad's submissions regarding its section 83 claim.

68. The second delegate's treatment of Dignidad's section 83 claim is set out at pages R8-R15 of his reasons (the relevant portions of which I previously excerpted). The second delegate, while accepting that some bullying and harassment occurred, nonetheless determined that this behaviour did not fall within the statutory parameters of section 83 of the *ESA*. In particular, a section 83 contravention requires proof that the retaliatory conduct (for example, threatening to dismiss an employee) was motivated by "a complaint or investigation [that] may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act". The second delegate determined that there was no evidence demonstrating this important nexus between the conduct and a complaint and/or the involvement of the Employment Standards Branch in the matter. I am unable to conclude that the delegate erred in reaching this conclusion and, in regard to natural justice, the second delegate received and considered all of Dignidad's evidence that was relevant to this issue.

69. As for Dignidad's assertion that the second delegate was biased against Dignidad and/or the appellant employees, I consider this to be wholly untenable assertion, entirely uncorroborated by any probative evidence. The section 112(5) record shows that the second delegate was in regular contact with Dignidad, and explained why certain issues were outside his mandate insofar as the referral back investigation was concerned. During the referral back process, Dignidad advanced several unfounded and inappropriate allegations regarding the integrity and competence of the second delegate. These allegations constitute nothing more than discreditable *ad hominem* attacks against the second delegate. It appears that Dignidad's "bias" allegation largely flows from the fact that the second delegate did not accept several of Dignidad's submissions about the proper scope of the referral back investigation. My review of the correspondence between the second delegate and Dignidad's representative (included in the section 112(5) record) leads me to conclude that much of the latter's frequently expressed frustration with the second delegate appears to have been based on his wholly erroneous view regarding the scope of my referral back order.

70. As discussed above, I do not consider the case for extending the appeal period in this matter to be particularly compelling, even leaving the presumptive merit of the appeal to one side. However, after taking into account the lack of merit of this appeal, there is, in my view, no legitimate reason for extending the appeal period. Even if the appeal period were extended, this appeal would, in any event, be dismissed as having no reasonable prospect of succeeding. Accordingly, I am refusing this application to extend the appeal period.

ORDERS

71. The appellant employees' application to extend the appeal period in this matter is refused. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the 2021 Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Appendix A: Appellant Listing

Group 1 – Individual Appellants

Complainants named in the 2021 Determination [named in the 2019 Determination]

Appellant Name	Tribunal File Number
Angela Mercedes Noj-Patricio	2022/007
Arceli Lopez Jaco	2022/013
Blanca Iris Garcia Lopez	2022/014
Celeste Noemi Siquinajay-Juarez	2022/015
Deysi Corina Martinez-Bernal	2022/016
Dinora Patricia Aquino-Garcia	2022/017
Edi Mariested Ramirez-Salazar	2022/018
Elida Carmencita Xetey-Loch	2022/019
Elida Luz Salazar y Salazar	2022/020
Eliezer Manuel Flores-Espina	2022/021
Elsa Maely Lima-Revolorio	2022/022
Eufemia Adelaida Baten-Ramos	2022/023
Fredi Orlando Valdez-Ramirez	2022/024
Gilber Donain Estrada-Mazariegos	2022/025
Gladis Odilia Perobal-Mutzutz	2022/026
Glenda Yaneth Lima-Revolorio	2022/027
Gloria Maribel Suy-Hernandez	2022/028
Gricelda Azucena Sandoval-Calderon	2022/029
Herminia Gamboa-Cesareo	2022/030
Iris Yaneth Vela-Leiva	2022/031
Jeniffer Susana Medrano-Molina	2022/032
Jesica Celeste Castillo-Jorquin	2022/033
Maria Amalia Itzol-Chicop	2022/034
Maria Arminda Lopez-Arreaga	2022/035
Maria del Carmen Saz-Yucute	2022/036
Maria Cristina Sutuj-Solano	2022/037
Maria Luisa Cobox-Cutzal	2022/038
Mario Alfredo Donado-Castro	2022/039
Marlin Yohana Lopez-Juarez	2022/040
Milvia Yesenia Saba-Ramirez	2022/041
Mirsa Amarilis Martinez-Bernal	2022/042
Nereida Yesenia Guevara-Rodriguez	2022/043
Nury Maritza Sisimit-Yojero	2022/044

Group 1 – Individual Appellants (cont'd)

Complainants named in the 2021 Determination [named in the 2019 Determination]

Appellant Name	Tribunal File Number
Olga Noj-Patricio	2022/045
Reina Victoria Balam-Morales	2022/046
Reyna Esmeralda Tala-Vasquez	2022/047
Sandra Veronica Lopez-Barrera	2022/048
Teresa Garcia-Pinzon	2022/049
Wendy Roxana Lorenzana-Salazar	2022/050
Yeison Mersai de Paz	2022/051
Alex Arnoldo Estrada-Escobar	2022/054
Delmy Alejandra Alonzo-Moreno	2022/056
Milton Erasmo Giron Godoy	2022/066