Citation: Harkamalrajresources Ltd. (Re)
2022 BCEST 6

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Harkamalrajresources Ltd.
(the "Appellant")

- 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:** Mona Muker

**FILE NO.:** 2021/080

**DATE OF DECISION:** January 19, 2022

# DECISION

## SUBMISSIONS

Sumandeep Singh, Barrister & Solicitor on behalf of Harkamalrajresources Ltd.

## OVERVIEW

1. Harkamalrajresources Ltd, carrying on business as Pizza Pizza (the "Appellant"), has filed an appeal under section 112 of *the Employment Standards Act* (the "*ESA*") of a determination issued by Shane O'Grady, a delegate ("Delegate O'Grady") of the Director of the Employment Standards (the "Director") on August 13, 2021 (the "Determination").

2. Delegate O'Grady found that the Appellant contravened sections 17, 18, 40, 45, 46, 58, and 63 of the *ESA*, and accordingly owed its former employee, Mr. Shivam Thakur (the "Employee"), unpaid wages, overtime pay, statutory holiday pay, annual vacation pay, compensation for length of service, and accrued interest, in the amount of $15,788.97. Pursuant to section 29(1) of the *Employment Standards Regulation* (the "*ESR*"), the Determination also imposed six administrative penalties in the amount of $500 each, for contravening sections 17, 18, 27, 28, 44, and 63 of the *ESA*. The total amount payable is $18,788.97.

3. The deadline for filing an appeal of the Determination was September 20, 2021, at 4:30 pm.

4. The Appellant appealed the Determination on September 21, 2021, alleging that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant also sought an extension of the statutory appeal period.

5. In correspondence dated October 4, 2021, the Employment Standards Tribunal (the "Tribunal") notified the Employee and the Director that it had received the Appellant's appeal, and it was enclosing the same for informational purposes only. They were further notified that no submissions on the merits of the appeal were being sought from them at that time. The Tribunal also requested the Director to provide the Tribunal with a copy of the *ESA* section 112(5) record (the "Record").

6. On October 26, 2021, the Tribunal received a submission from Delegate O'Grady containing the Director's Record and Record cover letter. Subsequently, the Tribunal requested the Director resubmit the Record and Record cover letter because of deficiencies within the October 26, 2021, submission. On October 27, 2021, the Tribunal received the Director's amended Record and forwarded a copy to the Appellant and the Employee on October 28, 2021. Both parties were provided an opportunity to object to the completeness of the Record. On November 19, 2021, the Employee, through his counsel, submitted an objection to the Record with accompanying documents that the Employee asserted should have formed part of the Record. The Director was provided an opportunity to respond. In a letter dated December 6, 2021, Delegate O'Grady advised the Tribunal that the Record was incomplete and agreed that the documents submitted by the Employee should form part of the Record. Accordingly, with the addition of the documents submitted by the Employee, the Tribunal accepts the Record as complete.

7. On January 12, 2022, the Tribunal requested Delegate O'Grady clarify whether there were additional workflow notes that had not been included in the Record. On January 14, 2022, Delegate O'Grady confirmed that the workflow notes in the Record were a combination of notes from both Delegate Ellis and Delegate O'Grady.

8. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it unnecessary to seek submissions from the Employee or the Director.

9. Accordingly, this decision is based on the Determination, the reasons for the Determination (the "Reasons"), the Appellant's appeal submissions, the Record that was before the Director when the Determination was made, and the aforementioned supplemental submission from Delegate O'Grady regarding the workflow notes.

## ISSUES

10. The two issues before the Tribunal are:

(1) whether the Director failed to observe the principles of natural justice in making the Determination under section 112(1)(b) of the *ESA;*

(2) and whether the Director erred in law in making the Determination under section 112(1)(a) of the *ESA*.

## DETERMINATION

### 1. Background

11. According to a BC Registry search conducted on April 23, 2020, with a currency date of February 28, 2020, the Appellant was incorporated in British Columbia ("BC") on January 4, 2018. Rajbir Randhawa ("Mr. Randhawa") and Harkamal Singh ("Mr. Singh") are listed as the directors. The Appellant operates a restaurant in Burnaby, BC.

12. The Employee was employed from March of 2019 to October 15, 2019. At the time of the termination of employment, the rate of pay was in dispute.

13. On April 15, 2020, the Employee filed a complaint (the "Complaint") at the Employment Standards Branch (the "ESB"), claiming the Appellant fired the Employee and failed to pay him outstanding wages, overtime pay, and compensation for length of service. The Employee's claim for unpaid wages was for the period of April 29, 2019, and onwards.

14. The Director received evidence from the Employee and the Appellant during the investigation of the Complaint before making the Determination. I will only set out those aspects of the factual background directly relevant to the issues on appeal.

15. The Record shows that the Appellant was provided with multiple opportunities to respond to the Complaint and provide correspondence, such as, wage statements and pay stubs.

16. The investigation began on June 24, 2020. On July 14, 2020, Agnieszka Ellis ("Delegate Ellis") sent a demand for records to the Appellant. Upon request, the Appellant was subsequently given an extension to August 7, 2020. The Appellant submitted some documentation. In September 2020, the Appellant acquired new counsel and as such requested another extension for providing evidence. An extension was granted to October 9, 2020. On October 20, 2020, Delegate Ellis was notified that the Appellant's counsel had withdrawn. In November 2020, the Appellant retained its current counsel.

17. The Record shows that on or before January 6, 2021, Delegate O'Grady, was assigned to investigate the Complaint. On January 6, 2021, Delegate O'Grady sent an e-mail to the Appellant requesting answers to certain questions, documents, and information by no later than January 19, 2021.

18. On January 13, 2021, Delegate O'Grady sent a second demand for records to the Appellant, due by January 27, 2021. The Appellant sought an extension to answer Delegate O'Grady's questions and to provide the records to the Director. The extension to answer the questions was granted until February 5, 2021. However, no extension to the second demand for records was granted because the Appellant was aware of the investigation and records it was required to produce since July 2020—as per the first demand for records.

19. The Record shows that the Appellant, with their current counsel, responded approximately 3 or 4 times to the Complaint and the Employee's submissions before the Determination was made. Delegate O'Grady sought no further submissions from the parties as of early to mid-May 2021, before making the Determination.

## 2. Reasons for the Determination

20. The Director noted that the Employee provided the following evidence in the investigation of the Complaint: The Employee arrived in Canada in April 2018 on a student visa and attended university in Kamloops and Coquitlam from May 2018 to April 2019. The student visa allowed the Employee to work 20 hours per week. Despite this condition, the Employee began working full-time for the Appellant in April 2019. The Employee enrolled in a single course in May 2019, but eventually dropped the course because the Employee understood that the Appellant would provide the Employee with employment and assistance in obtaining a work permit—which required obtaining a positive Labour Market Impact Assessment ("LMIA").

21. During his employment, the Employee received money by cheque and e-transfer. The e-transfers and several cheques were for expenses incurred, with "mileage" depicted as one of these expenses. Two of the cheques the Employee received in August 2019, were provided to support the Employee's LMIA application.

22. At the time of termination, the Employee's rate of pay was $14.50 per hour, based on an Employment Contract (the "Contract") that was prepared by Dilpreet Dhindsa of Axis Immigration, that the Employee signed and emailed on June 21, 2019. Upon receiving this new rate of pay, the Employee was promoted

to the role of Food Services Supervisor; meanwhile the Appellant was in the process of obtaining a LMIA. Prior to June 21, 2019, the Employee received $13.85 per hour.

23. During his employment, the Employee had several duties, including, delivery driver, tracking inventory, uploading inventory into the system, looking after the cooler/freezer, tracking expired items, purchasing grocery and supplies, and overseeing the restaurant when Mr. Singh was not present. The Employee's responsibilities gradually increased as Mr. Singh was present less and less, and the Employee began working over 50 hours per week. At times, 10-15 deliveries were required on any given shift. The Employee and Mr. Singh corresponded regularly via text message regarding work duties, hours of work, and on occasion, outstanding wages.

24. Shortly after being hired, the Employee was asked by Mr. Singh for cash in the amount of $15,000 to secure employment and permanent residency status in Canada. This included the cost to secure a positive LMIA. The Employee made several cash payments to Mr. Singh amounting to $15,000, using his own savings and earnings, and money loaned to him from several individuals.

25. As a result of the Contract created by Axis Immigration, a positive LMIA was secured around October 4 or 5, 2019. When the Employee inquired about next steps, Mr. Singh asked for $30,000 for his continued employment and to secure a work permit. The Employee refused and was thus dismissed on October 15, 2019.

26. The Director found that the Employee received several cheques for wages and expenses, which included mileage. He also received two e-transfers for wages and expenses. In total, the Employee received $5,799.96 in wages and $1,791.70 in reimbursement for expenses.

27. The Director noted witness testimonies provided by Navdeep Singh Brar ("Navdeep"), Varun Patel ("Varun"), Navneet Kaur ("Navneet"), Nandan Shukla ("Nandan"), Harpreet Singh ("Harpreet"), and Dharampal Singh ("Dharampal") during the investigation of the Complaint.

28. Navdeep provided the following information: Navdeep was hired to work for the Appellant around June or July 2019. Mr. Singh would text employees in a group chat, often the day before their shift, to let them know they would be working the following day. Navdeep worked 3-4 days per week, until his employment ended in February 2020, when he refused to pay the Appellant for a LMIA. The Employee told Navdeep that he gave money directly to Mr. Singh, and had money deducted from his wages to pay for the LMIA. The Employee had several responsibilities, including, making deliveries, supply requisitions, preparing orders, and advising other employees on how to perform roles.

29. Varun, the Employee's former roommate, testified that the Employee borrowed $1,500 from him. He was told the money was to purchase a LMIA. Varun did not witness the Employee giving the amount borrowed to anyone.

30. Dharampal, the Employee's friend, testified that the Employee borrowed $2,000 from him. He was told the money was to 'pay someone'. Dharampal did not witness the Employee giving the amount borrowed to anyone.

31. Harpreet, the Employee's friend, testified that he provided $1,000 to his friend Nandan, to give to the Employee. Harpreet was told the money was for a LMIA. Harpreet did not witness the Employee giving the amount borrowed to anyone.

32. Nandan testified that he gave the Employee $2,000 in May 2019. Nandan also received approximately $500 from Harpreet in January or February 2019, which he gave to the Employee. Nandan did not witness the Employee giving the amount borrowed to anyone.

33. Navneet provided the following information: Navneet is the Employee's wife. She worked for the Appellant from February 2019 to October 2019. She ended her employment because she wanted to return to India for an unknown period. Mr. Singh asked the Employee to drop out of school so that they could provide him with a LMIA, which would in-turn allow him to get a work permit. The Employee dropped out of school and was working at least full-time hours as of July 2019. The Employee received wages by cheque and e-transfer. The Employee worked more than 40 hours per week and would cover for Mr. Singh and other employees. The Employee worked from 10:30 am until 12:00 am or 2:00 am, approximately twice per week, often with only one day off in the week. The Employee was hired as a delivery driver but also addressed customer issues, provided customer service, and ordered supplies. A schedule of hours was posted in the restaurant, however, in time, the schedule was posted in a WhatsApp message group for the employees. After finishing their shift, employees would write down the actual hours worked, and the Appellant would pay wages based on that record. Navneet understood there were some issues between the Employee and the Appellant regarding the payment of wages. As a result of the Employee's underpayment of wages, Navneet covered the Employee's expenses. Navneet also understood that the Employee paid approximately $15,000 to the Appellant to purchase a LMIA—based on what she heard when the Employee asked a friend for a loan. In July 2019, Navneet gave the Employee approximately $2,000 and witnessed Dharampal and Nandan give approximately $2,000 each to the Employee, around the same time. Navneet does not recall if she was present when the Employee gave cash to Mr. Singh, but she believes the money was paid over 2 or 3 installments. The Employee was terminated in October 2019 but did not travel to India until January 2020.

34. The Director noted that the Appellant provided the following evidence in the investigation of the Complaint: The Employee responded to a job posting and was hired as a delivery driver. The position required performing duties inside when not making deliveries, such as, ordering supplies—under a supervisor. The Employee was never promoted to the role of Food Service Supervisor. He remained a delivery driver for the duration of his employment.

35. The Employee was on the Appellant's payroll from March 2019 to August 2019. From March 2019 to May 2019, he received $12.65 per hour. From June 2019 onwards, he received $13.85.

36. The Employee informed the Appellant that he was not interested in continuing his studies and wanted to get a work permit—which would require a LMIA from an employer. The Employee offered his services, but the Appellant did not finalize any details because the Appellant was considering multiple other workers. The Employee continued to work with the Appellant while the Appellant commenced the LMIA process. The Employee's name was later added to the LMIA application, but the job offer was not finalized, and no work permit was applied for.

37. Later, the Employee notified the Appellant that he consulted an immigration lawyer who advised the Employee that based on his work profile and past contraventions of immigration laws, there was a high chance his work permit would be refused. The Employee advised the Appellant that he did not want to proceed with the LMIA, would be returning to India, and did not want to return to Canada illegally after the expiration of his study permit.

38. The Employee quit his position when he informed the Appellant he was returning to India.

39. The Appellant argued that the LMIA process required a written contract. The Contract was for a future date and was supposed to come into effect once the Employee secured a work permit. Following the withdrawal of the Employee's name from the LMIA process, the Contract became null and void.

40. The Appellant submitted a variety of documents, including, wage statements, copies of cheques, e-transfer notifications, a T-4 for 2019, and a Record of Employment ("ROE").

41. In the Reasons, the Director included a chart for the wage statements submitted by the Appellant. The chart listed the pay period dates, hours of work, rate of pay, regular wages, vacation pay, gross earnings, and net earnings. The Director included a second chart for the cheques submitted by the Appellant. The chart listed cheque dates, cheque numbers, deposit dates, cheque amounts, and cheque notes.

42. The Appellant made two interact e-transfers in the amount of $1,228.50 on June 14, 2019, and $1,018.50 on June 26,2019. According to the T4 submitted by the Appellant, the Employee earned $7,433.84 in 2019. For September 2019 and October 2019, the Appellant argued that it paid the Employee in cash.

43. The ROE provided by the Appellant indicated that the last day the Employee worked for which he was paid for was August 31, 2019. It also showed "total insurable earnings" of $7,383.84 in 2019. The Director included a third chart showing the amounts earned in each pay period.

44. The Director noted witness testimony provided by Shikhar Shikhar ("Mr. Shikhar"), in favour of the Appellant. Mr. Shikhar has been employed for the Appellant, since approximately the first week of February 2019. Mr. Shikhar has worked as a cook and cashier. Due to a study permit, Mr. Shikhar only works 18 to 20 hours per week. Mr. Shikhar observed the Employee beginning employment in mid-March 2019. The Employee's hours varied depending on the needs of the store, however, he typically worked 4 or 5 hours per day, 4 or 5 days per week, for an average of 20 hours per week, because of his study permit. Eventually, the Employee began working more than 20 hours per week.

45. According to Mr. Shikhar, employees would receive a notice of their shift from Mr. Singh via phone or text message. Once an employee completed their shift, their actual hours of work were recorded in a notebook, which was kept at the workstation. Mr. Shikhar knew that the Employee received his wages by cheque with occasional payments in cash. The Employee's last day of employment was October 15, 2019. According to Mr. Shikhar, he was advised that the Employee quit his employment by both Mr. Singh and Navneet, the Employee's wife. Mr. Shikhar also understood that the Employee's final wages had been paid in full, based on statements made to him by Navneet.

**Job duties**

46. The Director noted that the Appellant submitted evidence of the Employee being a delivery driver, which was corroborated by several witnesses. The Employee submitted evidence of him being a Food Services Supervisor. There is evidence that the Employee occasionally addressed store supply or customer issues and worked in the restaurant. Text messages between the parties showed that the Employee's duties went beyond merely delivering pizza. Neither of the parties argued that the Employee was a manager. The Director found that the Employee had multiple duties, however, none of them classified the Employee as a 'manager'. The Director also found the Employee's job title was not relevant to any outstanding wages.

**Contract**

47. The Director found that the Contract did not indicate that the conditions of employment (and the higher wage rate) were dependent on the Employee securing or producing a valid work permit to the Appellant. The Contract simply placed the onus on the Employee for ensuring he had correct work permits. As for the start date of the Contract, the only indication of when it became effective was found in the provision 'when the employee assumes his functions'. The Director noted that the copy of the Contract produced by Axis Immigration had redactions in the area where the Appellant's signature would be found. No explanation was provided as to why it was redacted.

**Wages**

48. The Appellant provided wage statements showing the Employee's wage rate increased from $12.65 to $13.85 in June 2019. The Employee indicated he had an oral agreement with the Appellant to receive $13.85 per hour from the initiation of his employment. The Director noted that $13.85 was a specific number and happened to be the minimum wage that came into effect in June 2019—three months after the Employee began his employment. The Director found there was insufficient evidence for this agreement and thus found the Employee's wage rate prior to June 2019 equal to the minimum wage in BC at the time. The Directed found the Employee was paid $12.65 per hour until May 30, 2019; and was paid $13.85 per hour until June 20, 2019.

49. The Director found the wage statements and wage transactions to be inconsistent. Several cheques did not accompany wage statements, and some wage statements did not have an accompany cheque. Of the cheques produced, only four cheques matched the net wages shown on the corresponding wage statements. The remaining payments were for amounts greater or less than the corresponding wage statements.

50. The Director found that the Appellant's records and proof of payment of wages were unreliable in determining how much the Employee earned and received, thus, it was reasonable for the Employee to understand that the Contract and its increased wage rate to be in force. Without an accurate wage statement, the Employee had no way of knowing what rate of pay his wages were being paid. The Director found that the Employee's wage rate increased to $14.50 per hour on June 21, 2019—the date the Contract was signed, because the Contract did not specify a start date.

51. The Appellant provided text messages with other employees showing that it 'cleared the balance' of its employees at the end of their shifts. No indication was provided as to what 'balance' was cleared, though the balance was assumed to be wages. No explanation was provided as to why employees would be entitled to the 'balance' of their wages if the Appellant adequately paid wages by-monthly according to their wage statements. It was also not clear if the text message referring to $11.74 owed to the Employee was for wages or tip. The Director found whether employees were paid according to wage statements or paid the balance of their wages at the end of their shifts to be irrelevant to determining the wages the Employee was paid. The Director also found no record of any end of shift payments made to the Employee. The Director found the text message to be insufficient proof that the Employee's wages were paid at the end of each shift.

52. The Director found the documents submitted by employees confirming they were paid their wages, without prompting, odd; and noted that Navneet testified she was given instructions by Mr. Singh as to what to write. The Director found the documents of employees allegedly confirming they were paid their wages carried no weight to determining the wages the Employee was paid.

53. The Director found there was insufficient evidence to demonstrate that the two e-transfer payments were for wages rather than expenses. No wage statements were produced for the alleged wages paid by e-transfer, which is required by the *ESA*. The e-transfers were outside of the regular twice per month pay period and were for amounts greater than what the Employee was typically paid for wages, and at least one of them was made alongside a regular wage payment. Because of the lack of evidence to support that the e-transfers were for payment of wages, the Director accepted the information provided by the Employee that $1,507.53 of the e-transfers were for payment of wages, while the rest of the funds were for expenses.

54. The Director found that no wage statements were provided for the alleged cash payments of wages in September and October, which further casted doubt on the Appellant's claim to have a record of all wage transactions paid to the Employee. The Appellant provided no evidence of this arrangement with the Employee, or evidence of the cash payments. The Director found there was insufficient evidence to demonstrate that the Employee was paid any of his wages in cash for October 2019 or the remainder of this employment.

55. The Director noted that Section 28 of the *ESA* requires an employer to maintain several different payroll records, including a daily record of hours of work and the employee's gross and net wages for each pay period. Accordingly, the onus was on the Appellant to show it correctly paid the Employee's wages. The Director found there were obvious discrepancies between the proof of payment and wage statements produced by the Appellant, thus, the wage statements could not be relied upon as an accurate reflection of the wages paid to the Employee.

56. The Appellant provided the Employee's ROE for 2019. The Director found that several of the pay periods identified in the ROE showed amounts that did not correspond with the payments received by the Employee and/or wage statements for the same period. The ROE also showed the Employee's last day of work was August 31, 2019, which contradicted the Appellant's record of hours and witnesses' statements which indicated the Employee worked until mid-October 2019. Accordingly, the Director found the ROE was unreliable as proof of wages paid.

57. The Director noted that the *ESA* places the burden of proof on the Appellant, as the employer, to maintain accurate payroll records and that it adequately paid the Employee. This is not the Employee's responsibility. Given the inconsistencies with the Appellant's statements and numerous issues with the documents produced, the Director preferred the Employee's record as to what wages he actually received.

58. The Director noted that the Employee provided bank records that covered the course of his employment. These showed deposits, totalling to $7,591.66. Several cheques provided by the Appellant were payments for "mileage" and not wages. The Director accepted that of the $5,344.66 that was paid by cheque, $1052.23 was for mileage. The Director accepted that of the $2,247.00 paid via e-transfer, $739.47 were for expenses while the remaining $1,507.53 were for wages. The Director found the Employee's statement that these e-transfer payments were for partial payment of wages and reimbursement for expenses as the best evidence as to what these payments were for, since no wage statements were included with the e-transfer payments and the payments were for amounts that were not typically paid to the Employee for wages.

59. Based on the bank records, cheques, and e-transfers, the Director found that the Employee was paid $5,799.96 in wages during his employment and the remainder was paid as compensation for expenses.

**Hours**

60. The Director noted that the Appellant provided wage statements and hand-written daily records of the Employee's hours worked. The Employee provided a work schedule, however, both parties agreed these were inaccurate as employees frequently worked hours outside of their schedule. Witnesses for both parties agreed that their schedules were subject to change.

61. The parties also submitted extensive text message evidence. Several messages suggested that the Employee worked on days the Appellant's records show that the Employee did not work. In addition, for the days the Appellant's record did show the Employee worked, the text messages showed that the Employee worked longer hours than those the Appellant recorded.

62. The Director noted that the wage statements did not match the handwritten record of hours of work provided by the Appellant for multiple pay periods, including, periods ending on April 15, 2019; April 30, 2019; and May 15, 2019.

63. The Director found that the wage statements could not be relied on in determining the Employee's hours of work because the Appellant only provided wage statements for some periods, despite claiming to have a full record of payments made, and the wage statements did not match the hours of work provided by the Appellant.

64. The Director noted that the Employee testified that he worked approximately 50 hours per week, with some days averaging 12 to 15 hours, and others averaging less. The Employee agreed that these numbers were estimates for it was difficult to provide an accurate number because he did not keep a record. Meanwhile, the Appellant disagreed and claimed the Employee worked less. However, the Director found that to deny an employee a wage entitlement simply because he did not maintain a daily record—which

is explicitly an employer's responsibility under the *ESA,* would be inconsistent with the *ESA's* purpose to ensure employees receive at least basic standards of compensation.

65. The Director found that because the Appellant's records were incomplete and inconsistent with the remainder of the records produced by the parties, including wage statements, the ROE, text messages, and records of payment, the Director preferred the Employee's imprecise estimate of hours worked.

66. The Director found that based on an average of 50 hours per week, the Employee worked a total of 944 regular hours and earned a total of $13, 155.20 in regular wages between April 29, 2019, and October 15, 2019. The Employee already received $5,799.96 in wages. Thus, the Director determined that the Employee was owed $7,355.24 in outstanding regular wages.

**Overtime pay**

67. The Director found that the Employee worked 10 hours per day. Accordingly, under section 35 of the *ESA,* the Director found that the Employee was entitled to 1.5 x his wage for all hours worked over 8 hours per day. The Director determined that the Employee worked 236 overtime hours and earned a total of $4,933.20 in overtime wages between April 29, 2019, and October 15, 2019.

**Statutory holiday pay**

68. The Director noted that the wage statements produced by the Appellant did not show any statutory holiday payments made to the Employee. With that said, the Directly already found the wage statements to be unreliable in determining what wages were paid to the Employee. The record of hours showed that the Employee worked on at least one statutory holiday.

69. Section 45 of the *ESA* requires an employer to pay an employee an average days' work for each statutory holiday, provided they have worked for least 15 days in the 30 calendar days preceding the statutory holiday. Section 46 requires an employer to pay an employee, who works on a statutory holiday, 1 ½ times their regular wage rate for all hours worked, up to 12, on that day.

70. The Director noted that there was no indication that the Employee did not work on statutory holidays and none of the Appellant's wage statements showed that any statutory holiday pay was paid to the Employee during his employment. Thus, the Director found that the Employee was entitled to an average days' regular pay for each statutory holiday that occurred during his employment, in the amount of $471.80. The Director determined that the Employee worked Monday to Friday, thus, he was entitled to 1 ½ times his regular rate for all hours worked on each statutory holiday for a total amount of $870.00.

**Compensation for length of service**

71. The Director noted that the Employee maintained that he was terminated from his employment after he refused to pay more money for the LMIA. The Appellant maintained that the Employee quit his employment because he wanted to return to India. The Appellant's witness, Mr. Shikhar, testified the same, and allegedly had a conversation with the Employee's wife. However, Mr. Shikhar did not speak to the Employee directly and there was no indication that the Employee travelled to India immediately

following the end of his employment. Accordingly, the Director placed little weight on Mr. Shikhar's testimony.

72. The Director noted that the onus, again, was on the Appellant to demonstrate that the Employee quit his employment or carried out actions inconsistent with further employment. The Director found there was no evidence of any conversation between the parties in which the Employee quit, and there was no follow up from the Appellant to confirm the end of the employment relationship.

73. The Director noted that the ROE submitted by the Appellant, stated that the Employee "quit", which was the reason for issuing the ROE. However, as per the rules on the federal government's website, ROEs must be issued within 5 calendar days of the end of the pay period in which the interruption occurred. According to the ROE, the Employee's last day was August 31, 2019. The Appellant already agreed that this date was incorrect, as such, the ROE should have been issued no later than September 9, 2019. The ROE was issued on July 30, 2020—almost one year after the Employee allegedly quit. Thus, the Director found that this called into question the creditability and reliability of the ROE in determining when the Employee's employment ended. Furthermore, the ROE was directly contradicted by the record of hours submitted by the Appellant and Mr. Shikhar's testimony, for both indicated that the Employee worked until mid-October 2019. Therefore, the Director found they could not rely on the ROE to determine how or when the Employee's employment ended. The onus was on the Appellant to show definitively that the Employee quit his employment—and it failed to do so.

74. Accordingly, the Director determined that the Employee was terminated without cause on October 15, 2019. The Director found that because the Employee was employed for more than three months but less than one year, the Employee was entitled to one week of compensation for length of service based on an average week's pay during his final eight weeks of employment. The Director found that the Employee worked an average of 40 regular hours each week, in the eight weeks prior to his termination. Thus, the Employee was entitled $580 in compensation for length of service.

**Vacation pay**

75. The Director found that because the Employee earned a total of $20,010.20 in regular wages, overtime wages, statutory holiday pay, and compensation for length of service, he was entitled to 4% of those earnings, or $800.41, in vacation pay as per section 58 of the *ESA*.

**Fees charged for employment**

76. The Director noted that several testimonies indicated that the Employee borrowed money for the purposes of paying the Appellant to secure a LMIA. The Employee stated he paid $15,000 in cash installments to the Appellant, in the parking lot of the place of business, with no witnesses present. The Director placed very little weight on Navdeep's testimony that he was terminated for similar reasons, because the circumstances of Navdeep's termination were individual to himself. Furthermore, the Appellant provided documents showing Navdeep was unable to continue as a driver because of a driver license suspension.

77. The Employee provided text message evidence referencing a debt or money owed to the Appellant. However, the Director found there was insufficient text message evidence showing that any cash

payments were made to the Appellant, or any such arrangement was made for purchasing the LMIA. After the Employee's termination, when the Employee inquired about outstanding money, it would have been reasonable for him to also ask about the LMIA or the cash he paid, as well.

78. While the Employee demonstrated he received cash amounts from his friends with the intent to purchase the LMIA, the Director determined that the evidence was insufficient in showing that the Employee paid $15,000 to the Appellant to purchase the LMIA or that the Employee was entitled to any deductions made by the Appellant or money paid for the purposes of employment.

**Penalties**

79. The Director noted that section 17 of the *ESA* requires an employer to pay an employee all wages earned within a pay period no later than 8 days after the end of the pay period in which wages were earned. The Director found that the Appellant failed to pay the Employee all wages in a pay period on multiple occasions, with the final contravention occurring 8 days after the final full pay period in which the Employee earned wages (October 1 to 15, 2019). Accordingly, the Director imposed a mandatory $500 administrative penalty as of October 17, 2019—the date all wages were owed to the Employee.

80. The Director noted that section 18 of the *ESA* requires an employer to pay an employee all final wages within 48 hours of terminating their employment. The Employee was terminated on October 15, 2019. Accordingly, the Director determined the Appellant contravened section 18 on October 17, 2019, and thus imposed a mandatory $500 penalty.

81. The Director noted that section 27 of the *ESA* requires an employer to provide an employee with a written wage statement for each pay period. The Director found that the Appellant contravened section 27 for it did not provide such statements for multiple pay periods with the final contravention being on October 17, 2021. Accordingly, the Director imposed a mandatory $500 penalty.

82. The Director noted that section 28 of the *ESA* requires an employer to maintain payroll records, including the wages paid to the employee and a daily record of hours worked. The Director found that the Appellant contravened section 28 for it did not maintain accurate daily records of hours or a record of the payment of wages, most recently being on October 15, 2019. Accordingly, the Director imposed a mandatory $500 penalty.

83. The Director noted that section 44 of the *ESA* requires an employer to pay an employee an average days' wage for each statutory holiday the employee is entitled to. The Director found that the Appellant contravened section 44 for there was no evidence that the Appellant paid any statutory holiday pay, most recently being on October 17, 2019. Accordingly, the Director imposed a mandatory $500 penalty.

84. The Director noted that section 63 of the *ESA* requires an employer to pay an employee compensation for length of service, based on the length of time the employee worked for the employer, unless the employee quits or was terminated for cause. The Director found that the Appellant contravened section 63 on October 17, 2019, for the Employee did not quit his employment and was not terminated for cause. Accordingly, the Director imposed a mandatory $500 penalty.

85. Pursuant to section 88 of the *ESA*, the Director determined that the Employee was entitled to $778.32 in interest.

**ARGUMENTS**

86. The Appellant appeals the Determination on the bases that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

87. The Appellant, through their counsel, submit several pages of submissions. Many of the Appellant's arguments are redundant. I have summarized the Appellant's key arguments below.

88. The Appellant submits that the Employee was hired as a delivery driver and was not a manager. Further, that the wage statements and text messages submitted as proof were ignored by the Director.

89. The Appellant submits that it was denied procedural fairness because the Director found its wage statements unreliable, and the Appellant was not given an opportunity to address this concern.

90. The Appellant submits that the Director erred in law because the Director assumed the Employee was unaware of the wage rates paid.

91. The Appellant submits that the Director erred in law by finding the Contract enforceable on the date it was signed. The Appellant argues that a LMIA requires a tentative employment contract that becomes enforceable after a work permit is secured. The Appellant further argues that the Director did not appreciate how the Appellant offered the Employee, who was on a student visa and could only work part-time, a full-time job. This makes it clear that the Contract was enforceable on a later date.

92. The Appellant submits the Director was biased because the Director found that the Appellant placed little importance on the Employee obtaining or showing a valid work permit to continue employment and by allowing the Employee to work more than what was permitted by the Employee's visa. The Appellant submits that it did its due diligence in hiring the Employee.

93. The Appellant submits that it kept a record of the hours the Employee worked and that it acknowledges minor differences in the pay cheques for July 2019 and August 2019. The Appellant believes that the Employee was compensated for the difference of $141.76 between both pay cheques, at a later time, but does not have proof. The Appellant argues that it is unfair to be held to have unreliable records, based on minor discrepancies. The Appellant only failed to keep accurate records for September 2019 and October 2019, thus, the Appellant should only be held responsible for those months.

94. The Appellant submits that the Director erred in law by finding that no wage statements were produced for the e-transfers when the Appellant submit documentary evidence. The Appellant further argues that the Director was biased by finding its proof to be insufficient whereas the Employee was not asked to submit any evidence showing that the interact e-transfers were for expenses.

95. The Appellant argues that the Director failed to observe the principles of natural justice in making the Determination because it failed to consider evidence submitted by the Appellant, including all records,

whereas the Employee submitted no evidence. The Director preferred the Employees' estimates. The Appellant was also penalized for the period's records were produced for.

96. The Appellant admits what while it failed to keep accurate records for September 2019 and October 2019, the Employee was fully paid, as evidenced by the Employee's email, which admitted some payment was for wages and some was for expenses.

97. The Appellant again submits that the Employee did not provide proof that he wasn't paid and solely relied on the WhatsApp schedule, which was subject to change. The Appellant argues that it kept track of the hours in a notebook and paid accordingly.

98. The Appellant submits that the Director failed to observe the principles of natural justice by not providing detailed reasons for finding that the wage statements were inaccurate and could not be relied upon, when the records and hand-written notes for pay periods ending on April 15, 2019; April 30, 2019; and May 15, 2019, match.

99. The Appellant submits that the Director erred in law by finding that the Employee is owed over-time wages because the Employee was a part-time worker and never worked over 8 hours.

100. The Appellant submits that it cannot be held liable for not having proof that the Employee quit, because the Employee also did not have proof that he was terminated. The Appellant then re-argues facts that were already considered in the Reasons about the Employee's LMIA application, the Employee wanting to return to India, and quitting his job.

101. The Appellant submits that it paid vacation pay for the actual hours worked. The Appellant also submits that it did not violate the *ESA*, thus, the administrative penalties imposed, which are unconscionable and unwarranted, should be squashed.

102. The Appellant submits that it was denied the opportunity to submit an additional response, for Delegate O'Grady allowed the Employee to respond again after no more submissions were sought from the parties.

103. The Appellant resubmits wage statements, text messages, correspondence, and other materials found in the Record that it previously provided to Delegate O'Grady during the investigation of the Complaint.

## ANALYSIS

104. Section 112(1) of the *ESA* allows a party to appeal a determination on the following grounds:

(a) the director erred in law;

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

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

105. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of any appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

106. I will deal first with the preliminary issue of the timeliness of the appeal.

107. The Appellant emailed its appeal submission to the Tribunal on September 20, 2021, at 4:30 pm; however, it was received by the Tribunal at 4:31 pm on that date. The Appellant submits that it appealed the Determination within the statutory deadline— citing the date and time the email containing the appeal was sent. However, if the Tribunal determines that the appeal was not filed within the appeal period, the Appellant requests the Tribunal extend the appeal period to September 21, 2021.

108. An appeal is deemed to be filed upon *receipt* by the Tribunal: see *Rule 5(3) of the Tribunal's Rules of Practice and Procedure (Revised 9 Dec 2020)*. The Appellant's submission was received outside the Tribunal's business hours, after 4:30 pm on September 20, 2021, which is past the appeal deadline and is deemed to have been filed on the next business day—September 21, 2021.

109. Section 109(1)(b) of the *ESA* grants the Tribunal the discretion to extend the deadline for requesting an appeal when the appeal period has expired.

110. In *Niemisto*, BC EST # D099/96, the Tribunal identified a non-exhaustive list of criteria to be considered in an application to extend the appeal period including that the respondent party will not be unduly prejudiced by the granting of an extension.

111. I find it appropriate to grant an extension of the statutory appeal period under section 109(1)(b) of the *ESA* as the appeal was filed only a minute after the appeal deadline expired and the fact that the Employee will not suffer any unique prejudice if the appeal period were to be extended by one day. I am therefore extending the appeal period to September 21, 2021.

112. I will now turn to the merits of the grounds of appeal argued by the Appellant.

113. The Tribunal has consistently held that an appeal is not another opportunity to argue the merits of a claim to another decision-maker (*Re Masev Communications,* BC EST# D205/04). An appeal is an error

correction process, and the burden is on the Appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

114. In this case, the Appellant appeals the Determination on the basis that the Director failed to observe the principles of natural justice and erred in law. The Appellant's submissions largely re-argue *facts* that were already considered by the Director. The Appellant has also made a few inconsistent statements and contradictory arguments in its submissions, which I will address in my analysis below.

115. I am not persuaded with the merits of the grounds of appeal. Accordingly, I dismiss the appeal for the reasons set out below.

## 1. Principles of Natural Justice

116. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (*Re 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05). The party alleging failure to comply with natural justice must provide evidence in support of the allegation (*Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

117. There is nothing in the Reasons, Record, appeal forms, or submissions showing that the Director failed to comply with the principles of natural justice in making the Determination. The Record shows that the Appellant knew the allegations against it and was given a full opportunity to respond to the allegations before the Determination was made. The Record shows that the Appellant had approximately 3 or 4 opportunities to respond, from November 2020 onwards, with the assistance of its current counsel. The Appellant also had many opportunities to respond prior to November 2020, with the assistance of former counsel. The Employee being given one additional chance to respond does not give rise to a breach of procedural fairness. Furthermore, the ever-looping "opportunity to respond" would never end if one of the parties contests each time the opposing party submits additional information. The Director is permitted to seek additional information and to interview the Employee again, if they must—for clarification, before making a fair Determination.

118. The Appellant submits that the Director breached procedural fairness because the Appellant was not given an opportunity to address the Director's concern that its wage statements are unreliable. The Appellant's counsel did not provide any further explanation regarding what they mean by "an opportunity to address" this concern. I find that asking for another opportunity reasonably indicates that the Appellant would have preferred to re-submit records that would reflect more accuracy. Records are either accurate or inaccurate, at the time they are recorded. Regardless, I am unable to find an opportunity to "address" inaccurate records as a breach of procedural fairness because the Record shows that the Appellant had numerous opportunities to submit copies of its original records and it was aware of its duty to submit records throughout the duration of the investigation, dating back to July 2020 and onwards.

119. The Director's Reasons are detailed, articulate, transparent, and intelligible. The Reasons carefully explain that the Appellant's handwritten records of hours worked by the Employee do not match the wage statements for the periods ending on April 15, 2019; April 30, 2019; and May 15, 2019. Both parties and their witnesses agreed the record of hours were inaccurate as schedules were subject to change. Several text messages showed the Employee worked on days the Appellant's records showed the Employee did

not work. Thus, I find it was reasonable for the Director to find that the Appellant's records were unreliable.

120. I find that Delegate O'Grady did his due diligence in providing the Appellant opportunities to respond, and considered the Appellant's testimony, its witness's testimony, records, and submissions.

**Evidence**

121. A breach of natural justice can occur when a delegate's reasons fail to reconcile inconsistent evidence from the same party (*Re De Buen* BCEST #D025/12). A determination that a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a determination, and an analysis of the issue to which the evidence is relevant. Although a delegate is not required to advert to every piece of evidence before them, and a lack of mention of evidence does not necessarily mean that the evidence was not considered, some evidence is sufficiently probative that it must be expressly considered in the reasons (*Re Welch (c.o.b. Windy Willows Farm* BCEST #D161/05).

122. The Director's Reasons show that the Appellant's evidence was considered but dismissed because it was not found to be credible or reliable. The Director noted inconsistencies with the records that were provided. The wage statements clearly showed that the Employee no longer worked for the Appellant as of August 2019, yet according to the record of hours, text messages, and witness testimonies, the Employee worked until October 2019. The Appellant admitted that schedules changed last minute. This was also confirmed by witnesses for both parties. Furthermore, the ROE was issued one year after the employment ended, and several of the pay periods identified in the ROE showed amounts that did not correspond with the payments received by the Employee and/or wage statements for the same period. The ROE was also directly contradicted by the Appellant's record of hours and Mr. Shikhar's testimony.

123. As a result, I find that the Director did not breach principles of natural justice in their assessment of the evidence, for they reconciled inconsistent evidence and considered relevant evidence—it was just not in favour of the Appellant.

124. The Appellant argues that the Employee was not a manager. The issue of whether the Employee was a manager is obsolete. The Director found that the Employee performed several tasks but had no managerial role, regardless of the Contract stating the Employee's job title as a "Food Services Supervisor". A job title is irrelevant to the legal test of a manager. Furthermore, the Director found that the Employee's title did not have any relevance in determining the hours and wages the Employee was found to have worked and not paid for. This fact is not in dispute and is irrelevant on appeal because the Employee was found to be owed minimum wage for a certain period of his employment, as well as the wage indicated on the Contract for the proceeding period, *regardless of the Employee's title*. Therefore, I find there is nothing unreasonable about the Director's finding.

125. The Appellant admits that there were minor discrepancies in the Employee's pay cheques for July 2019 and August 2019 and that it failed to keep accurate records for September 2019 and October 2019; but finds it unfair to be held to have unreliable records for the entire duration of the employment. I find that there is nothing unfair about the Director finding against the Appellant for the entire duration of the employment, for these were not the only discrepancies. Hand-written records for many periods were missing, or did not match the wage statements, for periods before September 2019. The text messages

also did not match the records of the Employee's work schedule. According to the Record, the Appellant did not produce evidence of the Employee being compensated for the difference between the July and August pay cheques, and there were discrepancies with payments that were made prior to, as well.

126. The Director already considered the Employee's testimony that he received two e-transfer payments, some of it for wages and some of it for expenses. The Employee's admission is not evidence of the Employee being paid his wages in full, for some if it was to reimburse expenses. The Reasons and Determination show that the Director took the e-transfer payments into account when calculating the wages the Employee was owed.

127. I find that the Director's findings are reasonable, account for the evidence produced, and are well supported by the evidence that was before them.

**Burden of proof**

128. If a party has the legal burden of proof in a proceeding under the *ESA,* then that party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil standard, otherwise that party loses on that issue. The substantive law governs whether a party has the legal burden of proof. In civil proceedings, the legal burden of proof does not play a part in the determination if a determinate conclusion can be made based on the evidence. That is, the legal burden will not have a bearing on the decision unless, after considering all the evidence, the evidence is so evenly balanced that the tribunal can come to no sure conclusion: *Robins v. National Trust Co.* [1927] A.C. 515 (P.C.). In such a case, the party having the legal burden will not have satisfied the onus on it: The Law of Evidence in Canada, 2nd Ed., Sopinka, Lederman & Bryant, Butterworths, Toronto, 1999. (Cameron, BCEST #D076/06).

129. The Appellant argues that the Employee did not submit any proof to the Director. The Record shows that the Employee provided ample evidence, including, text messages, payments received, e-transfers, and witness testimonies to the Director. Thus, I am unable to conclude that the Employee did not provide any proof or has failed to meet any burden he had during the investigation of the Complaint. Meanwhile, I find the Director's finding that the Appellant failed to meet its burden of providing accurate wage statements and records is supported by the evidence. Thus, it was not unreasonable for the Director to find that the Appellant's inconsistent records and documents could not be relied on and for the Director to place weight on the text messages, e-transfers, payments, and witness testimonies. I find that the Director evaluated the evidence produced by both parties and noted the discrepancies with the Appellant's evidence.

130. Both parties presented testimony about the circumstances surrounding the end of the Employee's employment in October 2019. In the circumstances, it was not unreasonable for the Director to find that the Appellant had no follow-up correspondence regarding the alleged termination, or evidence of any conversation, and to find the ROE as inaccurate and thus unreliable in determining when the employment ended—given that the ROE was issued one year after the employment ended, and several of the pay periods identified in the ROE showed amounts that did not correspond with the payments received by the Employee and/or wage statements for the same period. I find that in the circumstances, it was reasonable for the Director to find the Employee's testimony and Navneet's testimony that the Employee did not travel until January 2020, to be more reliable, convincing, and believable. The Appellant had the burden

to prove that the Employee definitively quit or took actions that were inconsistent with further employment. The Appellant did not meet this burden.

131. I find the Director's conclusions to be reasonable and supported by the evidence before them.

**Bias**

132. An allegation of bias against a decision-maker is serious and should not be made speculatively. It ought not be made unless supported by sufficient evidence (*Re Khabazian-Isfahani* BCEST #D105/06). The test is "what would an informed person, viewing the matter realistically and practically, and having thought the matter through, thin[k] regarding whether it is more likely than not, whether consciously or unconsciously, that the decision maker would not decide fairly" (*Re 4R Pet Services Inc* 2020 BCEST 40). The onus of demonstrating bias lies with the party who is alleging its existence. A real 'likelihood' or probability of bias must be demonstrated. Mere suspicion or an impression of bias is insufficient to establish a claim (*Re Gallagher (c.o.b. Mid Mountain Contracting)* BCEST #D124/03).

133. In making findings of fact, the Director may accept some evidence as cogent and disregard other evidence, even if that evidence comes from the same source. A decision maker preferring the evidence of one party over another is not by itself evidence of bias. An apprehension of bias must be a reasonable one held by [a] reasonable right-minded person (see *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC) at 394).

134. In my view, a reasonable person, having read all the email communication between Delegate O'Grady and the Appellant, the evidence submitted by the Appellant, the Record, and the Reasons, would find that the Director was not bias against the Appellant—particularly in finding that the Appellant placed little importance on the Employee acquiring a work permit to continue employment and by allowing the Employee to work more than what was permitted by the Employee's visa. The Appellant has also not shown how or why these findings indicate a bias and how they prevented a fair determination. Merely making an allegation of bias is not enough. Regardless, I find that these findings are supported by the facts and evidence produced. It was reasonable for the Director to find that the Appellant placed little importance on the Employee acquiring a work permit given that the Appellant actually allowed the Employee to work more than what was permitted by his visa.

135. I find that there is no merit to the Appellant's argument that the Director was biased in finding the Appellant's evidence was insufficient and for not requiring the Employee to submit evidence showing that the interac e-transfers were for expenses. As mentioned previously and as noted in the Director's reasons— *keeping accurate records of wages is an employer's responsibility*. The Appellant failed to meet this burden by producing inaccurate and inconsistent records. In my opinion, a reasonable person—in the circumstances, would conclude that the Director was reasonable and entitled to finding the Employee's testimony and estimates more preferrable than the Appellant's documentary evidence, given its inconsistencies. This is not indicative of bias.

136. The Director did find in favor of the Appellant for the $15,000 that was allegedly paid by the Employee to the Appellant to secure the LMIA. The Director found there was not enough credible evidence for the alleged cash payments. The Director also found in favor of the Appellant that the Employee was paid

$12.65 per hour until May 30, 2019; and was paid $13.85 per hour until June 20, 2019. The Director found there was no evidence of an agreement that the Employee would be paid 13.85 prior to June 20, 2019.

137. In my opinion, a reasonable person would conclude that findings of such a nature in favour of the Appellant indicate a lack of bias against the Appellant.

138. I find that the Director was not bias.

139. Accordingly, I find that the Director did not breach the principles of natural justice.

## 2. Error of law

140. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam*), [1998] B.C.J. No. 2275 (B.C.C.A.):

> (1) a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the Assessment Act];
>
> (2) a misapplication of an applicable principle of general law;
>
> (3) acting without any evidence;
>
> (4) acting on a view of the facts which could not reasonably be entertained; and
>
> (5) adopting a method of assessment which is wrong in principle.

141. I find that the Director was alive to general principles of contract law when they interpreted the Contract the parties entered. The Contract, as it was written, imposed no positive obligation requiring the Employee to produce a work permit, school records, or enrolment status, for the Contract (and the higher wage) to come into effect at a later date. Nor was it actually stated in the Contract, that the Contract would become effective at a later date. The Contract stated that it came into effect the date the 'employee assumes his functions'. It also stated that the Employee was responsible to get proper authorization to work in Canada. Based on the Record, I find that the Employee had already assumed his functions when he signed the Contract, for the Record shows his duties did not change throughout the duration of his Employment, before or after signing the Contract. Furthermore, an application for a work permit had been made. If the parties wanted the Contract to come into effect later, they should have had the Contract drafted clearly to indicate their intent and impose appropriate obligations and conditions. There was also no evidence outside of the Contract, through the parties' communication or correspondence about the Contract's effectual date. The onus was on the parties. Absent any clear intent, the Director was reasonable in their interpretation to find that the Contract came into effect on the date it was signed. I find there is nothing unreasonable about this finding.

142. The Director has the authority to assess the reliability of evidence and credibility of witnesses. The issue of what weight should be given to certain evidence and credibility of witnesses are *questions of fact*, not law. Absent any persuasive evidence that a delegate's assessment was, for example, affected by bias, or made findings of fact that were unsupported by the evidence, the Tribunal has no jurisdiction to interfere (*Garrick Automotive Ltd. (Re),* 2020 BCEST 85; see *Britco Structures Ltd.*, BC EST # D260/03).

143. In rare cases, findings of fact may amount to an error of law where the Director acted without any evidence on a view of the evidence that could not be reasonably entertained; or committed a palpable overriding error; or arrived at a clearly wrong conclusion of the facts, unsupported by the evidence. In cases where there is some evidence, the Tribunal will generally not reevaluate the evidence or substitute the delegate's findings of facts with its own view, even if it is inclined to reach a different conclusion based on the evidence (*Hossein Lotfi (Re),* 2021 BCEST 70; *Re United Specialty Products Ltd.* BCEST #D075/12).

144. As noted in paragraph 91 above, the Appellant submits that the Director erred in law for the Director did not appreciate how *the Appellant offered the Employee*, who was on a student visa and could only work part-time, *a full-time job.* This makes it clear that the Contract was enforceable at a later date. A similar admission about allowing the Employee to work more than what was permitted by the Employee's visa, is in the Appellant's submission at paragraph 92. However, at paragraph 99, the Appellant submits that the Director erred in law by finding that the Employee is owed over-time wages because the Employee was a *part-time worker and never worked over 8 hours*. The Appellant's submissions directly contradict one another. Although this should warrant no further consideration from me, I find that the Director was reasonable in finding that overtime wages were owed for there was ample evidence through witness testimony and group text messages, showing that the Employee eventually became a full-time worker, and worked over-time on occasions.

145. The Appellant submits that the Director erred in law because the Director assumed the Employee was unaware of the wage rates that were paid. I am unable to conclude that this is an unreasonable finding because there is ample evidence in the Record that shows that no wage statements were produced for certain periods and the Appellant did not keep accurate or consistent records. Payments were also not made regularly and some of the payments did not match the records that were produced. In addition, a Contract was signed for a different wage rate, which the Appellant did not pay. I believe these facts were the essence behind the Director finding that the Employee was unaware of his rate. Therefore, I am unable to find that the Director acted without any evidence.

146. The Appellant submits that the Director erred in law by finding that no wage statements were produced for the e-transfers when the Appellant submit documentary evidence. I find that the Record supports the Director's finding for in the documentary evidence that was submitted, there were no wage statements for the e-transfers—and this was the issue, to determine what those e-transfers were for: wages or expenses. Had there been accompanying wage statements, the e-transfer payments would not have been in issue. The Record shows that the Appellant had inaccurate records, made payments outside of pay periods, and had wage statements that did not match what the Employee was actually paid.

147. The Appellant submits that it already paid vacation pay for the actual hours worked. To clarify, the vacation pay the Director imposed is for the unpaid wages that the Director found the Employee was owed. In calculating the wages owed, the Director already considered the $5,799.96 the Employee received from the Appellant in wages. The Director found that the Employee was owed a total of $20,010.20 in regular wages, overtime wages, statutory holiday pay, and compensation for length of service. Thus, the Employee is entitled to 4% of these earnings, or $800.41, in vacation pay under the *ESA.* The Director's findings and calculations are supported by the evidence. Therefore, I am unable to find the imposition of vacation pay as unreasonable.

148. I generally find the Director's acceptance of the parties' evidence on some issues while rejecting it on others to be supported by the evidence in the Record.

149. The Director was obliged to and did consider, evaluate, and weigh the evidence. Although the Director did not assess the evidence in the manner advocated by the Appellant, the Director's assessment was based on the evidence produced. Therefore, I find nothing unreasonable with the Director's assessment of the evidence produced and the credibility of witnesses.

150. I am also satisfied that the Director conducted a sufficient analysis of all legal tests and considered the facts in light of those tests. I am unable to find that the conclusions of the Director, which are challenged by the Appellant, are based on a view of the facts which cannot be reasonably entertained. As a result, I find that the Appellant has failed to show that the Director committed a palpable or overriding error in arriving to their conclusions, made a finding that was unsupported by the evidence, or came to a conclusion without any evidence.

151. Accordingly, I find that the Director did not err in law.

## 3. Penalties

152. The legislative scheme provides for mandatory administrative penalties without exceptions where a contravention is found by the Director in a determination. The Tribunal has no ability to ignore the plain meaning of the words of a statute and substitute its view of whether the administrative penalties may be set aside based on its judgment about whether they are unreasonable (*Re Kershaw Health Inc.* BCEST # D069/09).

153. The Appellant submits that it did not violate the *ESA*. Thus, the administrative penalties should be squashed. However, at paragraphs 93 and 96 the Appellant admits to having discrepancies in the Employee's July 2019 and August 2019 pay cheques; and to not keeping accurate records for September 2019 and October 2019. The Appellant's submissions are again inconsistent with one another, for these admissions give rise to violating the *ESA*.

154. Findings of violations of the *ESA* will amount to penalties being imposed under the *ESA*. I find that the Director's conclusions regarding the Appellant violating the *ESA* are supported by the evidence. Although, I do not doubt, that the penalties imposed are hefty, the Tribunal does not have the authority to remove or reduce these penalties when a violation of the *ESA* has been found.

155. As previously mentioned, an appeal is not another opportunity to argue the merits of a claim to another decision-maker. Yet most of the Appellant's submissions re-argued findings of fact that were already considered by the Director. Many of them were redundant and had to be summarized for the purposes of clarity and conciseness; and some of them contradicted one another. Thus, I found the Appellant's submissions to be generally argumentative towards the Director's Reasons.

156. Accordingly, I dismiss the appeal.

**ORDER**

157. The appeal is dismissed under section 114(1)(f) of the *ESA*. Pursuant to section 115(1) of the *ESA*, the Determination dated August 13, 2021, is confirmed, together with any interest that has accrued under section 88 of the *ESA*.

**Mona Muker**
**Member**
**Employment Standards Tribunal**