

EMPLOYMENT STANDARDS TRIBUNAL

An appeal  
pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

BKB Fish & Chips Ltd.

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Maia Tsurumi

**FILE No.:** 2022/175

**DATE OF DECISION:** October 13, 2022

## DECISION

### SUBMISSIONS

Balvir Bhullar

on behalf of BKB Fish & Chips Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), BKB Fish & Chips Ltd. (“BKB”) has filed an appeal of a determination (the “Determination”) issued by Tara MacCarron, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on July 19, 2022. The Delegate determined BKB breached section 8 (misrepresentation) and, accordingly, Jasvir Kaur Dhillon (the “Complainant”) was entitled to compensation under section 79(2) in the amount of her lost wages and annual vacation pay, along with accrued interest (section 58). The Delegate imposed a mandatory administrative penalty of \$500 for the contravention of section 8.
2. BKB appeals the Determination on the grounds that the Director failed to observe principles of natural justice.
3. For the reasons set out below, I dismiss the appeal under section 114(1)(f) of the *ESA*, because it has no reasonable prospect of success.
4. My decision is based on the submissions made by BKB in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination (the “Reasons”).

### ISSUE

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal has a reasonable prospect of success under section 114(1)(f) of the *ESA*.

### THE DETERMINATION

#### Background

6. BKB operates a restaurant in British Columbia. Service Canada issued a Labour Market Impact Assessment (the “LMIA”) to BKB on which the Complainant was listed as the foreign worker. The Complainant never worked at BKB. The last contact between BKB and the Complainant was in March 2020.
7. The Complaint was filed on July 15, 2020, alleging BKB contravened the *ESA* because it charged the Complainant for employment, and it misrepresented the availability of work for her. The Delegate issued the Determination on July 19, 2022.
8. Before issuing her Determination and the Reasons, the Delegate reviewed the Branch’s investigation of the Complainant’s allegations, which was completed by a different delegate of the Director (the “Investigating Delegate”).

### Issues Before the Delegate

9. The issues before the Delegate were: (1) did BKB misrepresent the availability of the position to the Complainant; (2) if BKB misrepresented the availability of the position to the Complainant, what is the remedy; and (3) did BKB request, charge or receive, directly or indirectly, from a person seeking employment, payment for employing or obtaining employment for the Complainant?

### Evidence Relied on by the Delegate

10. The Reasons have a summary of the evidence from the investigation (Reasons, pp. R2-R6). Below, I summarize the evidence relevant to BKB's allegations that the Delegate erred in her Determination.
11. The Complainant said she hired an immigration consultant, Robyn Deep Mann (the "Consultant"), in May 2019, to facilitate her immigration to Canada and help her get work here. The Consultant told the Complainant she had a job for 12 months as a cook at BKB. This was confirmed by a LMIA dated June 17, 2019, and a signed job offer from BKB dated May 28, 2019.
12. According to the Complainant, in October 2019, the Consultant told her: (1) to book her flights to British Columbia; (2) the Consultant would reimburse her in December 2019 for her flights; and (3) she was to start work on November 5 or 6, 2019. Thus, the Complainant booked flights for herself and her husband and arrived in British Columbia on November 3, 2019. The Complainant's work permit was issued on November 3, 2019.
13. The Complainant said she contacted the Consultant when she arrived in Canada but did not hear back. On November 10, 2019, the Complainant's husband contacted BKB and was told it did not know who he and the Complainant were. The Complainant's husband said he told BKB the Complainant was the foreign worker BKB had hired through the LMIA, and in response, BKB told him to contact the Consultant. The Complainant continued unsuccessfully to try to reach the Consultant throughout November 2019, but the Consultant was out of the country and unavailable.
14. The Complainant said the Consultant did not meet with the Complainant and her husband until December 12, 2019. At this meeting, the Consultant said her bank accounts were frozen by the Canada Revenue Agency and because of this she had not paid BKB its fees. The Complainant submitted copies of undated text messages with translations. At the December 12 meeting, the Consultant also told the Complainant she could not start working until the Consultant had paid BKB. This was the first time the Complainant heard about any agreement under which the Consultant would pay BKB.
15. The Complainant told the Investigating Delegate that in January 2020, her husband tried to contact BKB a number of times but each time BKB said it would not help the Complainant until it received payment from the Consultant. Finally, in February 2020, the Complainant went to BKB's premises and said she had been out of work for four months. She said she asked BKB to give her work but was told BKB could do nothing until it was paid by the Consultant.
16. The Complainant said the Consultant told her in late February 2020, she had paid BKB all but \$10,000 and would pay this remaining amount by the end of the week. The Complainant interpreted this to mean the Consultant was passing on to BKB the \$40,000 the Complainant had paid the Consultant for immigration,

employment and recruitment services. This was news to her. After this, the Complainant said she called BKB, but it still said it had not been paid. It further said it was feeling harassed and threatened to have the Complainant's work permit cancelled. The Complainant submitted an undated audio recording of a phone call between the Complainant's husband and BKB. The English translation provided by the Complainant has BKB asking the husband not to contact it again, telling the husband to contact the Consultant and saying it is not sure whether the Complainant's work permit is still valid.

17. The Complainant said she contacted the Consultant in March 2020 and they argued, with the Consultant threatening to have the Complainant's work permit cancelled. In response, the Complainant asked for a refund from the Consultant. The Consultant said the Complainant would have to speak to the Consultant's lawyer and if the Complainant continued to harass her, the Consultant would contact the police. The Complainant provided copies of these text messages to the Branch.
18. Balvir Bhullar provided evidence on behalf of BKB. She said she used the Consultant to hire a cook for BKB. BKB did not interview or meet the Complainant before BKB received a positive LMIA application. Ms. Bhullar agreed with the Complainant that BKB did not pay for the Complainant's flight to Canada. She said the Complainant did not tell BKB she was arriving in Canada on November 3, 2019.
19. Ms. Bhullar went to India from January 5 to February 13, 2020. Before she left, she asked the Consultant about the immigration status of the cook for BKB. According to Ms. Bhullar, the Consultant said the hiring process was still in progress.
20. Ms. Bhullar said the first contact BKB had with the Complainant was in February 2020. While Ms. Bhullar was still in India, the Complainant called her and said she was available to work. Ms. Bhullar asked the Complainant to come to BKB on February 13, 2020, and start work. Ms. Bhullar said the Complainant never contacted BKB again about her employment. As a result, BKB contacted Service Canada to tell them the Complainant had not started working at BKB.
21. Ms. Bhullar also said the Complainant went to BKB in March 2020 and asked for fake wage statements, stating she did not want to work at BKB but wanted to keep the appearance of working there to help with her permanent residency application. BKB refused to do this.
22. Ms. Bhullar told the Investigating Delegate BKB closed on March 29, 2020.
23. The Investigating Delegate also heard evidence from the Consultant. The Consultant confirmed she acted for both BKB and the Complainant. She was hired by BKB to find a cook. She found the Complainant for BKB and had her added to the LMIA. The Complainant paid the Consultant \$40,000 for her services, which the Consultant said were immigration consultancy and immigration documents processing. The Consultant denied she paid any fees to BKB.
24. The Consultant said the Complainant received her work permit in October 2019, but the Consultant was on vacation at that time so did not respond to the Complainant about next steps. The Complainant went ahead on her own and arrived in Canada without telling the Consultant or BKB her plans. The Complainant did not contact BKB immediately but once she did, BKB was experiencing a downturn in business and so BKB asked the Complainant to wait until January 2020 to start work. The Consultant said the Complainant agreed to this.

25. The Consultant told the Investigating Delegate that in February or March 2020, BKB and the Complainant argued at BKB. The Consultant said BKB told her it was disappointed in the Complainant, and she lived too far away to work at BKB. BKB also told her that the Complainant asked it for false wage statements.
26. The Consultant continued to work with the Complainant, even though it was unlikely the Complainant would work for BKB, until April 2020, when the Consultant hired legal counsel because the Complainant was harassing her and threatening to sue her.

### The Delegate's Decision

*Did BKB misrepresent the availability of the position to the Complainant, and if so, what is the remedy?*

27. The Delegate found BKB misrepresented the availability of the position to the Complainant and therefore breached section 8 of the *ESA*.
28. The Delegate began by explaining section 8 says an employer must not induce, influence or persuade a person to become an employee or to work or to be available for work, by misrepresenting the availability of the position, the type of work, the wages, or the conditions of employment. The Delegate said section 8 applies to pre-hiring representations and a misrepresentation under the *ESA* is an incorrect or false statement that leads the job applicant to misunderstand the availability of the position, the type of work, the wages, or the conditions of employment. A misrepresentation does not have to be intentional. It requires some evidence the misrepresentation affected the employment contract and influenced someone to accept employment. An employee must also show a loss because of the misrepresentation.
29. Before determining whether there was a misrepresentation, the Delegate found BKB was liable for the actions of the Consultant. The Consultant was authorized to act as BKB's immigration consultant and did so throughout the events in issue. The Complainant, BKB, and the Consultant agreed BKB retained the Consultant to act on its behalf in finding a suitable cook using an LMIA. BKB sought out the Consultant's services, completed the LMIA, and signed the job offer letter sent to the Complainant. BKB also repeatedly referred the Complainant and her husband back to the Consultant. Also, the LMIA lists the Consultant as the third-party representative. Based on all of this, BKB was responsible and liable for the Consultant's actions.
30. The Delegate found the Consultant, acting with the authority of BKB, misrepresented the availability of the position to the Complainant and this resulted in a loss to the Complainant.
31. The Complainant trusted the Consultant about the job at BKB and neither the Consultant nor BKB gave the Complainant any reason to doubt the validity of the LMIA, job offer, and employment contract. All these documents were signed before Ms. Bhullar left for India in January 2020 and so were finalized by this time. When there is a positive LMIA issued to an employer, the employment relationship begins to form and once a specific employee's name is listed on the LMIA, there is an enforceable, contractual employment relationship between the employer and the temporary foreign worker. BKB knowingly applied for and signed the LMIA, which was approved with the Complainant listed as the employee on June 17, 2019. Thus, when the Complainant was issued her LMIA, there was a contractual agreement between BKB and the Complainant. This contract was that once the Complainant arrived in Canada, there

would be a job as a cook for her. Almost five months later, on November 3, 2019, this contract was confirmed when the Complainant was issued an employer-specific work permit as an employee of BKB.

32. The Delegate found the availability of the position was false. The misrepresentation that there was a job available for the Complainant, crystallized (ended) in February 2020 when the Complainant and BKB argued at BKB over the fact the Complainant was still without work. After this event, the Complainant knew, or ought to have known, there was no work for her at BKB.
33. Because the evidence did not allow the Delegate to determine the exact date the misrepresentation crystallized, the Delegate found February 14, 2020, was the most reasonable date to infer when the misrepresentation ended and the breach of section 8 occurred, because Ms. Bhullar was in India from January 5 to February 13, 2020. While the Reasons state it was the Consultant who was in India until February 13, 2020 (Reasons, p. R10) I find this was a typographical error. The Delegate's summary of the evidence in the Reasons at page R4 shows the Delegate knew it was Ms. Bhullar who was away at this time. The Record confirms this (Record, p. 229).
34. The Delegate referred to section 79(2) of the *ESA*, which sets out remedies for a misrepresentation: (1) hiring the person and paying them any wages lost because of the misrepresentation; (2) reinstating the person and paying them any wages lost because of the misrepresentation; (3) paying the person compensation; and / or (4) paying the employee reasonable and actual out of pocket expenses caused by the misrepresentation.
35. The Delegate found the relationship between the parties was irrevocably damaged and so remedies (1) and (2) were not appropriate. Thus, the Delegate ordered compensation and reasonable out-of-pocket expenses, which were the Complainant's lost wages, including vacation pay, and the cost of her flight to Canada. She found the work period started on November 6, 2019, and ended March 29, 2020. Although the employment contract was for 12 months, the Delegate accepted BKB's evidence that it was forced to shut down on March 29, 2020, because of the Covid-19 pandemic. In total, compensation for lost wages was \$9,172.80, including annual vacation pay of \$352.80. The Delegate ordered BKB to also pay \$1,478.40 for the Complainant's flight to Canada, as an out-of-pocket expense.

*Did BKB request, charge or receive, directly or indirectly, from a person seeking employment, payment for employing or obtaining employment for the Complainant?*

36. The Delegate found BKB did not request, charge or receive, directly or indirectly, payment for employing or obtaining employment for the Complainant.
37. The Delegate reviewed section 10 of the *ESA*, which prohibits anyone from requesting, charging for, or receiving payment for employing or obtaining employment from someone seeking employment. The Delegate found there was insufficient evidence to show BKB breached section 10. The Complainant said some of the money she paid to the Consultant was for her employment. The Consultant said she only provided immigration services. There was no corroborating evidence to show what portion of the \$40,000, if any, was for employment services. The text messages submitted by the Complainant did not prove the payments referred to occurred or what they were for. There was conflicting testimony and there was insufficient evidence for the Delegate to accept the Complainant's version of the facts over BKB's or the Consultant's version.

### *Determination*

38. In the result, the Delegate determined BKB owed the Complainant compensation of \$10,651.20.
39. The Complainant was also entitled to accrued interest of \$615.55 under section 88 of the *ESA*.
40. The Delegate imposed a mandatory penalty of \$500 for BKB's breach of section 8.

### **ARGUMENTS**

41. BKB submits the Delegate failed to observe principles of natural justice because she made incorrect observations. By "observations," I understand BKB to mean findings of fact and conclusions. BKB disagrees with the following aspects of the Determination and Reasons:
- a. the Complainant had fulfilled her condition of employment to have a valid visa when BKB's owner, Ms. Bhullar, went to India on January 5, 2020 (Reasons, p. R7, para 2, line 25);
  - b. the misrepresentation crystallized in February 2020, when the Complainant and BKB met and argued over the fact the Complainant was still without work (Reasons, p. R7, para 2, line 37);
  - c. there was a contractual employment relationship between BKB and the Complainant (Reasons, p. R7, para 2, line 29);
  - d. the Complainant would have been forced to end her employment by March 29, 2020 (Reasons, p. R8, para 3, last line);
  - e. the Complainant was entitled to 4% vacation pay on the loss of wages component of the compensation award (Reasons, p. R8, para 2, last line and p. R9, line 3); and
  - f. the date of the contravention was February 14, 2020 (Reasons, p. R10, "Penalty").

### *Finding the Complainant had a valid visa in January 2020 and the employment contract was finalized at that time*

42. BKB says the Delegate erred in finding the Complainant had fulfilled her condition of employment to have a valid visa by the time Ms. Bhullar was leaving for India in January 2020. It says this finding was based on the wrong assumption that BKB was notified of the visa when BKB had no idea the Complainant had her visa and had arrived in Canada (Appeal Form, p. 7). BKB says the employment agreement required her to notify BKB that she had received her visa and had arrived in Canada and to come to work immediately after her arrival in Canada, none which she did, because she never intended to work at BKB (Appeal Form, p. 7). According to BKB, it could not schedule the Complainant for work because it did not know she was available to work.
43. BKB further says when the Complainant met with Ms. Bhullar at BKB's premises in February 2020, she did not ask to work. She only asked for false pay stubs. As she had not worked any shifts, BKB could not provide her with any pay stubs.

*The misrepresentation crystallized when the Complainant and BKB met and argued over the fact the Complainant was still without work*

44. BKB says the Delegate was incorrect in her finding there was a misrepresentation and that it crystallized in February 2020 (Appeal Form, pp. 7-8). According to BKB, there was work available to the Complainant as required by the employment agreement. But the Complainant never visited BKB after arriving in Canada. This was because she never intended to work and only wanted pay stubs to use for her permanent residency application. BKB says it called Service Canada to report the Complainant's misuse of her work permit and told the Complainant it had done so.
45. BKB also says the Consultant did not act on its behalf in the transaction with the Complainant because the Consultant was in a conflict of interest (Appeal Form, pp. 5-8). The Consultant was providing services to the Complainant.

*There was a contractual employment relationship between BKB and the Complainant and the date of the contravention was February 14, 2020*

46. BKB says the Delegate erred in finding a contractual employment relationship because the Delegate did not consider a contractual relationship requires an employee to communicate with the employer, as well as the employer to communicate with the employee (Appeal Form, pp. 5-6, 8). BKB submits, it was a condition of the Complainant's employment that, as soon as she landed in Canada, she inform BKB she had arrived with her visa, and it was also a condition of employment she start work at BKB as soon as she landed.
47. Further, BKB says the Consultant was not acting on behalf of BKB because the Consultant was in a conflict of interest (Appeal Form, pp. 5-6).
48. BKB also says if there was a misrepresentation, it occurred in November 2019, not February 14, 2020 (Appeal Form, p. 8).

*The Complainant would have been forced to end her employment by March 29, 2020*

49. BKB says the Delegate erred in finding the date the Complainant's employment would have ended was March 29, 2020 (Appeal Form, p. 6). The Province of British Columbia (the "Province") announced a state of emergency on March 18, 2020 and BKB closed on March 20, 2020 and thus the end date cannot be March 29, 2020.

*Annual vacation pay*

50. BKB also argued the Delegate erred by adding 4% vacation pay on to the loss of wages component of the compensation award. BKB says the Complainant never worked for it so she was not entitled to vacation pay. Section 58(1) of the *ESA* says an employee is only entitled to vacation pay after five calendar days of employment.



## ANALYSIS

51. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Section 112(1) of the *ESA* says a person may appeal a determination on any of 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.
52. I find this appeal has no reasonable prospect of success for the reasons below.
53. There was no breach of principles of natural justice. BKB knew the case it had to meet and was given a fair opportunity to respond. However, BKB takes issue with some of the Delegate's factual findings and conclusions and so I also consider whether the Director erred in law.
54. In the context of appeals to the Tribunal, an error of law occurs in the following situations:
1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
  2. a misapplication by the decision-maker of an applicable principle of general law;
  3. where a decision-maker acts without any evidence;
  4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
  5. where the decision-maker is wrong in principle:
- Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA). The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

### There was a contractual employment relationship between BKB

55. I find the Delegate did not err in finding the Complainant was an employee of BKB by at least November 3, 2019.
56. The oral evidence and the documents support the Delegate's finding there was an employment relationship. BKB had the Consultant give the Complainant, on BKB's behalf, a signed offer of employment dated May 28, 2019. By June 17, 2019, BKB had a positive LMIA from Services Canada listing the Complainant as BKB's employee (Record, pp. 55-58). The employment contract required the Complainant to have a valid work permit and successfully arrive in Canada. The Complainant had a valid work permit dated November 3, 2019 (Record, p. 116) and arrived in Canada on November 3, 2019 (Record, p. 113).
57. BKB submits the Complainant had to notify BKB when she had her visa and had arrived in Canada and had to come to work by November 4, 2019, or within a few days of her arrival in Canada and because she did

not, there was no employment relationship. However, there were no such conditions of employment. The employment contract required the Complainant have a valid work permit and successfully enter Canada (Record, pp. 85-89). In the offer letter, BKB says the Complainant had to start work “as soon as possible” (Record, p. 85). Even if this vague statement was an enforceable a condition of work, it did not require the Complainant to start work by November 4, 2019, or within a few days of November 3, 2019.

There was a misrepresentation that crystallized when BKB and the Complainant met and argued in February 2020

58. I find the Delegate did not err in finding BKB, through its agent the Consultant, misrepresented the availability of the position to the Complainant and that this misrepresentation crystallized on February 14, 2020. A misrepresentation is an untrue statement that affects an employee’s decision to accept employment and results in a loss to the employee because of that decision: *Jeff Parsons (Re)*, BC EST # D110/00, p. 6.
59. The Delegate found the misrepresentation happened when BKB, through the Consultant, hired the Complainant to work at BKB as a cook and the Consultant told the Complainant she would begin work on November 5 or 6, 2020. The Delegate concluded the misrepresentation persisted until Ms. Bhullar and the Complainant argued and after this time the Complainant knew, or ought to have known, BKB’s representation about the availability of work was false. The Delegate describes this situation when the misrepresentation ended as the misrepresentation “crystallizing.”
60. The evidence in the Record shows the Delegate’s conclusion was reasonable. All the witnesses agreed the Complainant was hired by BKB to work as a cook and she was told there was work for her once she arrived in Canada with a valid work permit. The Complainant and the Consultant both told the Investigating Delegate there was no work for the Complainant between November 3, 2019, and January 2020. BKB said the Complainant called Ms. Bhullar in February 2020 when Ms. Bhullar was out of the country and so Ms. Bhullar told the Complainant to come to BKB to start work when Ms. Bhullar was back in Canada in February 2020.
61. BKB says it was unaware what the Consultant was telling the Complainant about the availability of work. However, as the Consultant was BKB’s authorized agent, anything the Consultant told the Complainant when acting as its agent was as if it came directly from BKB.
62. BKB now says the Consultant was in a conflict of interest and so was not acting for BKB and thus the Delegate erred in finding BKB responsible for the misrepresentation. I cannot accept its submission. The evidence supports the Delegate’s conclusion that BKB authorized the Consultant to act for it throughout the events in issue. The Complainant, BKB, and the Consultant all said BKB retained the Consultant to act on its behalf in finding a suitable cook using an LMIA. BKB said it sought out the Consultant’s services and it completed the LMIA, signed the job offer letter sent to the Complainant, and was otherwise content to leave the details of the hiring process to the Consultant. There is a signed employer representative agreement between BKB and the Consultant (Record, pp. 176-177). BKB listed the Consultant as BKB’s third-party representative on the LMIA (Record, p. 179).
63. Even if the Consultant could not act for both BKB and the Complainant without a conflict of interest, there is no legal basis on which to find that at the material time, which is when the misrepresentation was made

and while it continued, the Consultant was not acting on behalf of BKB. A conflict of interest does not negate fact the Consultant was BKB's authorized agent.

64. Finally, regarding the Delegate's finding that February 14, 2020, was a reasonable date on which to find the Complainant and Ms. Bhullar argued at BKB's premises resulting in the misrepresentation crystallizing and a violation of section 8, I find no error. The Reasons (p. R5), the Investigation Report (Record, pp. 8, 12-13), and the Branch's Workflow Sheet (Record, pp. 229-235) indicate the argument may have occurred sometime in February or March 2020. Thus, the Delegate had some evidence on which to fix the date as February 14, 2020.
65. Further, nothing turns on finding the misrepresentation ended on February 14, 2020, and not a date in March 2020. As I explain above, the Delegate reasonably found there was a misrepresentation that ended when the Complainant and Ms. Bhullar argued at BKB's premises in 2020. Whether this was in February or March makes no difference.

#### The Complainant would have had to end her employment by March 29, 2020

66. I find the Delegate did not err in finding the Complainant would have been forced to end her employment at BKB by March 29, 2020. The Delegate relied on the Workflow Sheet (Record, pp. 229-235). It states Ms. Bhullar told the Investigating Delegate BKB closed on March 29, 2020 (Record, p. 230).
67. BKB says it closed on March 20, 2020, after the Province declared a state of emergency on March 18, 2020.
68. I cannot accept BKB's appeal submissions that it closed on March 20, 2020, instead of March 29, 2020, as evidence. An appeal is decided on the record that was before the Director, unless there is new evidence available that was not available at the time the Determination was made: *ESA*, section 112(1)(c). For the Tribunal to accept new evidence requires the evidence be something that could not have been discovered and presented to the Director prior to the Determination being made: *Bruce Davies et al.*, BC EST # D171/03 at p. 3. BKB's appeal submission that it closed on March 20, 2020, including its reference to a news release by the Province about declaring a pandemic on March 18, 2020, does not meet this requirement. This is evidence that could have been provided to the Investigating Delegate.

#### Inclusion of annual vacation pay in the compensation award

69. BKB says the Delegate could not add 4% vacation pay to the loss of wages component of the compensation award because the Complainant never worked for BKB. However, under section 79(2)(c) of the *ESA*, the Delegate has discretion to award compensation to the Complainant. Compensation can be awarded based on lost wages, vacation pay, and benefits even where, like here, an employee did not actually perform any work for the employer: *Larysa Hamilton (Re)*, 2020 BCEST 4 at para. 57. Section 79(2) gives the Director broad jurisdiction to place an employee in the same position she would have been in but for the wrongful act of the employer: *Tricom Services Inc. (Re)*, D485/98, at p. 14. If the Complainant had worked at BKB, she would have earned her wages of \$14.00 per hour, plus annual vacation pay of 4%.

**ORDER**

70. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed as having no reasonable prospect of success and pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated July 19, 2022.

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**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**