

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Jithin Johnson
(the “Employee”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE No.: 2021/068

DATE OF DECISION: October 20, 2022

DECISION

SUBMISSIONS

Jonathon Braun

counsel for Jithin Johnson

Michael Thompson

delegate of the Director of Employment Standards

OVERVIEW

1. On December 23, 2021, I issued *Johnson*, 2021 BCEST 104 (the “Appeal Decision”), allowing an appeal by Jithin Johnson (the “Employee”) of a determination dated June 30, 2021 (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Director”).
2. In the Appeal Decision, I found that the Director had erred in concluding that the Employer, Brink Forest Products Ltd., had not charged a fee for hiring the Employee, contrary to section 10 of the *Employment Standards Act* (the “ESA”). I referred this issue back to the Director.
3. In addition, I found that the Director erred in concluding that the Employer had not made an impermissible deduction from the Employee’s wages by charging him rent, contrary to section 21 of the *ESA*, and also referred this matter back to the Director.
4. The Employer applied for a reconsideration of the Appeal Decision. In *Brink Forest Products Ltd.*, 2022 BCEST 19, the reconsideration panel confirmed the Appeal Decision (the “Reconsideration Decision”).
5. On July 27, 2022, the Director issued a report following the referral back in the Appeal Decision (the “Referral Back Report”). In the Referral Back Report, the Director proposed that the Tribunal vary the Determination to find that the Employer contravened section 10 and section 21 of the *ESA*.
6. I sought submissions from the parties on the Referral Back Report. This decision finalizes the appeal following my referral back order to the Director.

THE REFERRAL BACK REPORT

7. As part of the referral back process and prior to issuing the Referral Back Report, the Director’s delegate (the “Delegate”) sought submissions from the parties on the issues to be determined.
8. The Delegate first considered whether the Employer had breached section 10 of the *ESA* by charging the Employee fees for recruitment. The Delegate found that Gabriel Chand (“Mr. Chand”), the lawyer who had charged fees to the Employee, charged these fees “at least **partially for** recruiting” the Employee. The Delegate also found Mr. Chand had acted as the Employer’s agent in doing so. [**emphasis added**]
9. The Delegate next considered the question of what proportion, if any, of the fees charged should be considered to have been for immigration services. The Delegate said he was “certain that at least a portion” of the fees Mr. Chand charged were for immigration services, but Mr. Chand failed to clearly

inform the Employee that this was the case, and the Employer could not benefit from Mr. Chand's failure to do so. The Delegate also said that determining the amount of fees Mr. Chand charged for immigration services was impossible "given the evidence on the file." The "only first hand evidence" was from the Employee, "whose evidence was that the entirety of the fees were represented as being for recruitment services". The Delegate therefore concluded that the Employer breached Section 10 of the *ESA* when Mr. Chand acted as its agent in charging recruitment fees, and that all of Mr. Chand's fees were charged for recruitment.

10. In determining the issue of whether the Employer breached section 21 of the *ESA* by charging the Employee rent, the Delegate noted that John Brink ("Mr. Brink"), the sole director and officer of the Employer, provided the Employee with housing.
11. After considering the test for determining whether two or more legal entities may be treated as one entity for the purposes of the *ESA* and the parties' submissions, the Delegate found the Employer and Mr. Brink were associated employers under section 95 of the *ESA*. The Delegate noted the Employer and Mr. Brink are separate legal entities, and as Mr. Brink is the Employer's sole director and officer they are under common direction. The Delegate found they were engaged in a common enterprise – the provision of foreign workers for the Employer's mill. The Employer sought and hired workers from outside Canada, and Mr. Brink ensured these workers had access to convenient and affordable housing. With respect to the final part of the test, the Delegate noted there is nothing limiting the application of section 95 solely to enforcement proceedings. The Delegate found that in this case, it was appropriate to associate the Employer and Mr. Brink to ensure that the purposes of the *ESA*, and in particular the protection of workers, were not defeated.
12. The Delegate therefore found the Employer contravened section 21 of the *ESA* in making an impermissible deduction from the Employee's wages by charging the Employee rent.
13. As a result of these findings, the Referral Back Report proposes that the Tribunal vary the original Determination to reflect contraventions of sections 10 and 21 of the *ESA* and order that the Employer pay the amount of \$7,685.58 for the section 10 contravention, and \$2,450.00 for the section 21 contravention. The delegate calculated an additional \$1,435.48 in interest on the \$10,135.58 in unpaid wages, for a total additional amount owing of \$11,571.06.

ANALYSIS

14. The Tribunal requested submissions from the parties on the Referral Back Report.
15. The Employee sought confirmation of the Delegate's findings in the Referral Back Report and also submitted that additional mandatory administrative penalties in the amount of \$2,000 be included in the Tribunal's final Order.
16. The Employer did not provide a submission in response to the Referral Back Report.
17. The Tribunal requested further submissions from the Employer and the Director on the specific issue of the Employee's request that additional mandatory administrative penalties be included in the Tribunal's final Order.

18. Although the Employer sought, and was granted, an extension of time in which to respond to the Tribunal's request for further submissions, the Employer did not provide any submission.
19. The Delegate submitted that there were no circumstances in which the penalties would be escalated; however, the Delegate also submitted that two penalties in the amount of \$500 should be added to the Determinations, for a total of \$1,000 in additional penalties.
20. On review of the Referral Back Report and the submissions, I confirm the findings in the Referral Back Report. In addition to the wages found owing in the original Determination, I also confirm the additional amounts found to be owed to the Employee in the Referral Back Report in the amount of \$11,571.06. In addition to the \$500 penalty levied in the original Determination for the Employer's contravention of section 8 of the *ESA*, I also confirm the imposition of a \$500 penalty for the section 10 contravention and a \$500 penalty for the section 21 contravention. The total additional amount owing is therefore \$12,571.06.

ORDER

21. Pursuant to section 115(1) of the *ESA*, I order that the Determination dated June 30, 2021, be varied to include the additional amount of \$12,571.06 for a total amount owing of \$17,785.42 as well as additional interest that has accrued under section 88 of the *ESA*.

Carol L. Roberts
Member
Employment Standards Tribunal