

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Harminder Singh  
("Mr. Singh")

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE No.:** 2023/116

**DATE OF DECISION:** March 11, 2024

## DECISION

### SUBMISSIONS

Jonathon Braun	counsel for Harminder Singh
Pir Indar P.S. Sahota	counsel for A J Boyal Truck Repair Limited
Dawn Sissons	delegate of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Harminder Singh (“Mr. Singh”) of a determination issued by Dawn Sissons, a delegate of the Director of Employment Standards (“deciding Delegate”), on June 23, 2023 (“Determination”).
2. The Determination found Mr. Singh’s employer, A J Boyal Truck Repair Limited (“AJ Boyal”), had contravened Part 3, section 17, Part 4, section 40, Part 5, section 45, Part 7, section 58, and Part 8, section 63 of the *ESA* and ordered AJ Boyal to pay wages in the amount of \$3,149.39 and administrative penalties in the amount of \$2,000.00.
3. Mr. Singh has appealed the Determination, alleging the deciding Delegate erred in law and failed to observe principles of natural justice in making the Determination.
4. The Determination and reasons for Determination indicate they were served on Mr. Singh and on AJ Boyal by mail and email and on their respective counsel by email. The Determination sets out dates for delivering an appeal to the Tribunal: July 17, 2023, if served by email; and July 31, 2023, if served by regular or registered mail. As it presently stands, the operative date for delivering the appeal was July 17, 2023.
5. The Tribunal has not raised any issue with the timeliness of the appeal. Counsel for Mr. Singh says the Determination and reasons were not served on him by email, but by registered mail.
6. The appeal was received by the Tribunal on July 31, 2023, the deadline set for delivering an appeal where service was made by registered or regular mail.
7. In correspondence dated August 16, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, requested submissions from the parties on document disclosure, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
8. Counsel for AJ Boyal filed a submission on document disclosure, which was moot as the documents that were the object of the submission had already been disclosed during the investigation process.
9. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Singh, care of his legal counsel, and to AJ Boyal, care of their legal counsel. Both have been provided with the opportunity to object to its completeness.

10. In correspondence dated October 31, 2023, counsel for AJ Boyal indicated that all the documents provided by the employer during the complaint investigation process were included in the record, but that several documents submitted on behalf of Mr. Singh had not been forwarded to AJ Boyal and should not be considered or, if the documents were to be considered, that AJ Boyal be given the opportunity to respond to them.
11. There has been no objection by Mr. Singh to the completeness of the record.
12. For the purposes of this appeal, I accept the record is complete.
13. My review of the submission received with the appeal, the record, and the Determination indicated there was sufficient presumptive merit to the appeal to warrant seeking further submissions from the parties.
14. In correspondence dated November 15, 2023, the Tribunal invited the Director and AJ Boyal to make submissions on the merits of the appeal.
15. The Tribunal received submissions from the Director and from counsel for AJ Boyal.
16. The submissions were provided to Mr. Singh and an opportunity was provided to him to make a final reply.
17. The Tribunal has received a final reply from counsel for Mr. Singh, the Tribunal has provided this submission to the other parties, indicating no response is required.

## **ISSUE**

18. The question to be decided in this appeal is whether Mr. Singh has shown errors in the Determination on any of the chosen grounds of appeal found in section 112 of the *ESA*.

## **THE DETERMINATION AND THE REASONS FOR THE DETERMINATION**

19. AJ Boyal operates a truck repair business in Richmond BC. Mr. Singh was employed at the business as a Truck and Transport Mechanic from July 2018. The deciding Delegate found Mr. Singh's agreed rate of pay was \$28.00 an hour. While the reasons for Determination indicate the rate of pay was not an issue, whether Mr. Singh ever received this rate of pay was an element of his complaint. There was disagreement between the parties on when Mr. Singh's employment ended; the deciding Delegate found his last day of employment was October 1, 2019.
20. In the reasons for the Determination (the "reasons"), the deciding Delegate identified eight issues arising in the complaint:
1. What is the wage recovery period;
  2. Was [Mr. Singh] owed regular wages, and if so, how much;
  3. Was [Mr. Singh] owed overtime wages, and if so, how much;
  4. Was [Mr. Singh] owed statutory holiday pay, and if so, how much;
  5. Was [Mr. Singh] owed vacation pay, and if so, how much;

6. Was [Mr. Singh] owed wages for unauthorized deductions;
  7. Was [Mr. Singh] owed compensation for length of service, and if so, how much; and
  8. Was [Mr. Singh] charged for obtaining employment with AJ Boyal, and if so, is he owed wages?
21. During the complaint investigation process, counsel for Mr. Singh submitted two audio recordings of telephone conversations: one from a conversation said to have occurred on October 22, 2019, between Mr. Singh and Savpreet Boyal (“Mr. Boyal”), who is listed as a director of AJ Boyal, with Mr. Singh’s cousin, Sukhwinder Mann (“Mr. Mann”), listening in and intervening; and the other from a conversation said to have occurred on February 29, 2020, between Mandeep Singh Mann, a former co-worker of Mr. Singh, and Mr. Boyal, with Mr. Singh and Mr. Mann present.
  22. The audio recordings were transcribed, and those transcripts were provided to the investigating Delegate. Counsel for AJ Boyal objected to the admissibility of the audio recordings and, consequently, the transcripts.
  23. The deciding Delegate addressed this objection as a preliminary matter in the reasons, finding the audio recordings and transcripts were admissible, but that little weight would be given to them. The rationale for that finding is set out in the reasons.
  24. The deciding Delegate then summarized the information provided by counsel for Mr. Singh and counsel for AJ Boyal. The deciding Delegate noted that they each submitted their own record of the daily hours worked by Mr. Singh for AJ Boyal, but that their records differed greatly. The deciding Delegate found the record provided by AJ Boyal to be the most accurate and reliable evidence of Mr. Singh’s hours. The rationale for this finding is set out in the reasons.
  25. On the issues identified, the deciding Delegate set the wage recovery period from July 30, 2018, to October 1, 2019.
  26. The deciding Delegate found Mr. Singh was entitled to regular wages, overtime wages, statutory holiday pay, annual vacation pay, and length of service compensation,
  27. The deciding Delegate found Mr. Singh had not established entitlement to wages for unauthorized deductions.
  28. The deciding Delegate found there was insufficient evidence to show that AJ Boyal had contravened section 10 of the *ESA* by charging Mr. Singh a fee to obtain his employment.
  29. In the result, the deciding Delegate ordered AJ Boyal to pay Mr. Singh for regular wages, overtime wages, statutory holiday pay and compensation for length of service, plus interest. The deciding Delegate also imposed mandatory administrative penalties for breaches of the *ESA*.

## MR. SINGH'S ARGUMENTS

30. Mr. Singh has raised the error of law and natural justice grounds of appeal: sections 112(1)(a) and (b) of the *ESA*. Counsel for Mr. Singh has summarized the errors in the Determination as follows:

- The Director failed to ensure a fair and efficient investigation;
- The Director failed to consider all available evidence when rendering her decision;
- The Director failed to conduct an adequate credibility assessment;
- The Director failed to consider the unique vulnerabilities of temporary foreign workers when reviewing the evidence and rendering her decision; and
- The Director failed to issue mandatory administrative penalties for the Respondent's [AJ Boyal's] failure to pay wages upon termination of employment and vacation pay.

31. More specifically, Mr. Singh says his concerns about the Determination stem primarily from the deciding Delegate's findings that: the audio recording evidence should be afforded little weight; he was only owed 24 hours' worth of unpaid regular wages and overtime wages; AJ Boyal did not make unauthorized deductions against his wages; and he was not charged illegal recruitment fees. Mr. Singh further notes that the amounts awarded for statutory holiday pay, vacation pay, and compensation for length of service would also require re-calculation if his appeal were successful.

### Decision on the Audio Recordings

32. Mr. Singh submits the deciding Delegate adopted a method of assessment that is wrong in principle when she decided the audio recordings and transcripts submitted by Mr. Singh would be given little weight because both parties had provided documentation the deciding Delegate could rely on, the transcribed portions of the audio recordings were not 'officially' translated, and Mr. Boyal, through his counsel, disputed the transcripts and the transcription.

33. Mr. Singh says the Employment Standards Branch does not require 'official' translations or third-party transcriptions of documents and if that was going to be required in this case, either, or both, the investigating and deciding Delegate should have advised counsel for Mr. Singh.

34. Mr. Singh submits that counsel for AJ Boyal provided his own evidence about the audio recordings and the transcripts: asserting Mr. Singh and the persons supporting him on the calls were "forcing him" – Mr. Boyal – "to say things"; that there were words in the audio recordings that are not captured in the transcripts; and the transcriber selectively attributed words to Mr. Boyal. Counsel submits that quite apart from whether it is proper for legal counsel to be giving evidence of what he heard on the audio recordings, even if the statements made by AJ Boyal's legal counsel could be attributed to Mr. Boyal, the information that was provided by Mr. Singh demanded more investigation than what was conducted by any delegate.

35. Mr. Singh points to other aspects of the circumstances surrounding the audio recordings and transcripts that he says demonstrate a failure to properly and adequately investigate the evidence presented by Mr. Singh, and that such failure constitutes a breach of natural justice.

36. He also says the investigation was unfair, identifying the failure of the delegates (there was more than one delegate involved in the investigation) to request needed evidence, to speak with Mr. Boyal directly, and the excessive delay of more than three years as elements of this contention.

37. Mr. Singh argues the credibility concerns related to the audio recordings and transcripts made that matter ripe for an oral hearing and cross-examination.

### **Decision on the Record of Hours**

38. Mr. Singh says much of the Determination flows from the decision of the deciding Delegate to accept the record of hours submitted by AJ Boyal over those provided by Mr. Singh. He says that on a proper assessment, that decision ignored evidence and acted on a view of the facts which could not be reasonably entertained and was an error of law and a breach of natural justice.

39. Mr. Singh expands his argument under three headings.

#### **1. Consistency of Records**

40. He submits the deciding Delegate's reasoning for accepting AJ Boyal's record of hours is faulty for several reasons, including the rationale that those records are "in a consistent comprehensive format and appear to be the same notebook," accepting, without reservation or investigation, the assertion that AJ Boyal does not have a punch clock machine, failing to address the effect of the screen shots provided by Mr. Singh – and the implication of the information contained in those screen shots – and implying that Mr. Singh has filed a false claim, supported that claim with false records and fabricated evidence.

#### **2. The Purported Handwriting 'Expertise' of the Deciding Delegate**

41. Mr. Singh has expressed a particular concern over the assertion by the deciding Delegate, in accepting AJ Boyal's record of hours and rejecting Mr. Singh's denial of ever having seen or signed the record of hours attributed to him, that while she is "not a handwriting expert," . . . "Mr. Singh's signature on the Timesheets is very similar to the signing of Mr. Singh's name on the records he provided" and on that basis it is "most likely" that Mr. Singh signed those Timesheets: see page R15 of the reasons.

42. Mr. Singh submits the acceptance of AJ Boyal's record of hours worked was critical to the deciding Delegate's ultimate findings on Mr. Singh's wage claims, but was based on a professed lack of expertise to reach the conclusion she did and was, in any event, made without a proper consideration of the entirety of the material bearing on the validity of her acceptance of AJ Boyal's Timesheets and without any assessment or consideration of other facts and factors that ought to be considered when making such a crucial decision. Counsel contends this failure demonstrates an insufficient level of care relating to her consideration of the evidence that is raised to an error of law.

#### **3. Other Concerns**

43. Mr. Singh says that in addition to the concerns that are raised by the conflicting evidence relating to the audio recordings and transcripts and the record of hours worked provided by AJ Boyal, there are many other elements of the position taken by AJ Boyal that should have compelled a comprehensive

investigation and analysis of the credibility of AJ Boyal and Mr. Boyal, but was ignored during the investigation and decision on Mr. Singh's complaints.

### **Vulnerabilities of Migrant Workers**

44. Under this point, Mr. Singh refers to the particular vulnerabilities of migrant workers to abuse from potential or actual employers, making the point that in commenting on certain aspects of the information provided, or not provided, by Mr. Singh, the deciding Delegate imposed unrealistic expectations on him.

### **Unauthorized Deductions and Recruiting Fees**

45. Mr. Singh submits the conclusion of the deciding Delegate that there was insufficient evidence that Mr. Singh had to pay back wages and had to pay illegal recruitment fees to get his job is not sustainable if the audio recordings had been given more weight.

### **Excessive Delay**

46. Mr. Singh says the delay between the filing of his complaint and the Determination of them was excessive and "calls into question the Investigation process and the [deciding] Delegate's ability to reach a fair decision."

### **Administrative Penalties**

47. Lastly, Mr. Singh submits the deciding Delegate erred in law in failing to impose administrative penalties for a contravention of sections 18 and 58 of the *ESA*.
48. Several remedies are requested. These shall be considered later in this decision.

### **DIRECTOR'S RESPONSE**

49. The Director has filed a response to the appeal addressing most of the points raised in Mr. Singh's appeal submission. Generally, the Director submits there is no error of law or breach of natural justice in the Determination.

### **Decision on the Audio Recordings**

50. The Director submits the decision to give the audio recordings and transcripts little weight was based on the finding by the deciding Delegate that other documentary evidence constituted the best evidence of Mr. Singh's hours of work and wages paid and, given that better, more reliable evidence was available, it was appropriate to rely on that evidence and give little weight to the transcript of the audio recordings.
51. Relating to the reference in the transcript of the audio recordings to the Labour Market Impact Assessment ("LMIA"), the Director submits there was no concrete evidence that any fees were paid to AJ Boyal for either recruitment or the LMIA.

### **Decision on the Record of Hours**

52. The Director says the deciding Delegate has the authority to prefer the evidence of one party over that of another. That authority was exercised in this case and the reasons for doing so are set out in the reasons for the Determination.
53. The Director says that while Mr. Singh contends evidence was ignored, it is not apparent from the appeal submission what evidence was ignored.
54. The Director says the decision to rely on the hours of work record provided by AJ Boyal was not based solely on the finding that it was Mr. Singh's signature on the records pertaining to him, but also on the deciding Delegate's finding and analysis that "the timesheets provided by AJ Boyal are in a consistent comprehensive format and appear to be in the same notebook."

### **Credibility Assessment**

55. The fundamental proposition in the response of the Director on this point is that the legislation does not require delegates to conduct credibility assessment in Determinations. The Director contends Mr. Singh is simply attempting to re-argue a position he already made during the investigation process.

### **Vulnerability of Temporary Foreign Workers**

56. While acknowledging the deciding Delegate did not make reference to Mr. Singh as a temporary foreign worker in the Determination, the complaint was decided on the evidence; Mr. Singh was represented by legal counsel throughout the process and given full opportunity to participate in the investigation. The Director says the process was procedurally fair and there was no breach of natural justice because the deciding Delegate did not refer to Mr. Singh as a temporary foreign work in the Determination.

### **AJ BOYAL'S RESPONSE**

57. AJ Boyal has also filed a response to the appeal submission. AJ Boyal raises a preliminary objection to the timeliness of the appeal, contending the appeal was filed "out of time." AJ Boyal notes the Determination indicates it was sent to Mr. Singh and his counsel by email and mail on June 23, 2023. AJ Boyal says as the Determination was delivered by email on Mr. Singh, the appeal was required to be delivered to the Tribunal by July 17, 2023.
58. AJ Boyal contends that while Mr. Singh has characterized the issue as being whether the Director failed to ensure a fair and efficient investigation and failed to consider all evidence, AJ Boyal considers the most important issue to be whether the Tribunal will approve the fabrication and manipulation of the record.
59. The submission attaches previous submissions made during the investigation and the material that accompanied those submissions. The submissions and the material are contained in the record.
60. The submission responds to each of the points raised in the appeal submission.



### **Decision on Audio Recordings**

61. AJ Boyal makes much the same argument in their submission as they did during the investigation, submitting the transcripts of the audio recordings should not be relied upon because they are not official, they appear to have gaps, and their accuracy has been disputed. AJ Boyal also reiterates their contention that the speakers are not known with certainty.
62. AJ Boyal says the deciding Delegate correctly applied the law in deciding to what extent the transcript of the audio recordings could be relied on.

### **Decision on the Hours of Work**

63. AJ Boyal has referred to assertions made in an earlier submission and the material that accompanied that stated their position on why the record of hours submitted by AJ Boyal should be accepted and Mr. Singh's records should not be accepted. AJ Boyal's central contention is that Mr. Singh's records of hours were manipulated.
64. Substantially, the submission of AJ Boyal identifies evidence that indicates the decision on the hours of work was grounded in evidence provide by AJ Boyal. It reiterates the evidence of AJ Boyal that there is no practice in the business of recording hours of work on a time punching machine but rather, "they have a register (notebook) where each employee writes their hours of work and put [sic] their signature." AJ Boyal points out that "all the remaining employees provide affidavits to that effect."

### **Vulnerability of Migrant Workers**

65. In response to the arguments of Mr. Singh, AJ Boyal says it should not be forgotten that this case is dealing with a foreign migrant worker "who is indulging in unethical (and unscrupulous) activities such as preparing false time sheets in order to get maximum benefits from the employer".

### **Unauthorized Deductions and Recruiting Fees**

66. AJ Boyal says there was no evidence from Mr. Singh of unauthorized deductions and illegal recruitment fees even though he has tried to use "unscrupulous audio recordings" to establish these claims.

### **Excessive Delay**

67. AJ Boyal says this submission ignores the effect of Covid-19, which impacted every aspect of life for two years and accounted for a substantial part of the delay in processing Mr. Singh's complaint. AJ Boyal says the delay was not a failure by the Director and did not result in any injustice to Mr. Singh.

### **Mandatory Administrative Penalties**

68. AJ Boyal says the deciding Delegate committed no error of law in not imposing administrative penalties for what are alleged to be contraventions of sections 18 and 58 of the *ESA*. AJ Boyal contends there was no contravention by AJ Boyal of either provision.

## MR. SINGH'S FINAL REPLY

69. Mr. Singh has been provided with an opportunity for final reply and has provided an extensive response to the submissions from the Director and from AJ Boyal. This submission will be addressed within the analysis of this appeal as necessary or appropriate.

## ANALYSIS

70. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more 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.*

71. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

### Error of Law

72. The Tribunal has 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 (BC CA.):

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.

### Natural Justice

73. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, are given the opportunity to reply, and have the right to have their case heard by an impartial decision maker.
74. They are context driven. As noted by the Tribunal in *Inshalla Contracting Ltd.*, BC EST # RD054/06 at para. 22, citing *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602:

Indeed, the attributes of natural justice may vary according to the character of the decision and the context in which it applies.

75. In the context of this case the allegations of breach of principles of natural justice are framed around the failure of the deciding Delegate to consider all of the evidence submitted and a failure to address credibility. The appeal submission is structured around particular elements of the investigation and the reasons for Determination.
76. For convenience and consistency, I shall address the appeal as it is structured by Mr. Singh and answered by the Director and AJ Boyal.
77. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. As stated above, an appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
78. Before assessing the arguments in the appeal, I will address the objection raised by AJ Boyal on the timeliness of the appeal, which he says was filed after the period set out in section 112(3)(a) and is therefore time barred. At the time the determination was issued and at the time of the filing of the appeal, section 112(3) read as follows:
- 112 (3) *The appeal period referred to in subsection (2) is*
- (a) *30 days after the date of service of the determination, if the person was served by registered mail, and*
- (b) *21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).*
79. Overlapping appeal periods created by different methods of service has caused some confusion which had not been addressed in July 2023. It was not raised as an issue until AJ Boyal did so in their submission received December 18, 2023. On one view of the provisions addressing the appeal period – focussing solely on the email service – it could be said the appeal was filed out of time. A different outcome would result if the appeal period for registered and regular mail were used. I do not, however, need to make any pronouncement on that as I find this appeal does have some presumptive merit and no party would be unduly prejudiced by extending the appeal period. Based on those findings and in the circumstances of this case, even accepting the operative date for delivering an appeal to the Tribunal was July 17, 2023, I would choose to exercise my authority under section 109(1)(b) and extend the appeal period to July 31, 2023.

### **Decision on the Audio Recordings**

80. To recap the decision on the audio recordings and transcripts: the deciding Delegate found they were admissible as evidence – that finding has not been appealed, although AJ Boyal re-argues their admissibility in their submission – but for reasons set out by the deciding Delegate, were accorded little weight. Those reasons are found at page R4:

The transcripts and translation are unofficial and do not appear to have been completed by a third party. A J Boyal has disputed the transcripts and the translation provided by Mr. Singh. Since

both parties provided documentation that I can rely on for my findings and analysis I will give little weight to the audio recordings and transcript.

81. While it is well established that assessing the weight of the evidence is within the purview of the deciding Delegate and this Tribunal should not intervene lightly, this assessment must be minimally defensible, in terms of both substance and reasons. There is also no disputing that a deciding delegate may prefer the evidence of one party over that of another.
82. That being said, the deciding Delegate’s reasons for ascribing ‘little weight’ to the audio recordings and transcripts requires a consideration of whether the reasons for the decision adequately support the conclusion. The law requires “justification, transparency and intelligibility within the decision-making process”: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190; see also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21.
83. This means the deciding Delegate’s reasons must provide a justification for her findings – in this case, the finding that the audio recordings and transcripts be given little weight. This must be done in an intelligible manner, which means that this panel of the Tribunal must be able to understand the logical path followed by the deciding Delegate, even though I need not agree with each and every choice made by her along that path. Only then can I assess whether the decision under review “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir, supra.* at para. 47.
84. Member Roberts effectively applied this principle in *ARA Development Ltd.*, BC EST # D012/08, where she cancelled a determination that was rooted in questions over the truth of certain documents, stating at para 35:
- [...] the delegate's analysis and reasons for preferring the evidence of one party over another is one which must be carried out diligently and carefully. Further, the delegate's reasons must be sufficiently adequate to enable the Tribunal to determine whether the assessment was sound.
85. Applying the above comments to the decision of the deciding Delegate to give the audio recordings and transcripts ‘little weight’ is concerning.
86. In my view, the deciding Delegate at the very least was required to address, on the evidence, why it was appropriate this material should have been given little weight.
87. There were no apparent concerns about the credibility of the audio recordings and transcripts expressed in the reasons. While the deciding Delegate never indicated in her reasons that there was a credibility issue relating to the audio recordings and transcripts, or even acknowledge there was a credibility issue in their submission on the appeal, the reasons given by the deciding Delegate to attribute ‘little weight’ to them can only be described as related to credibility.
88. In response to the appeal, the Director contends the audio recordings and transcripts were given little weight because there was other documentary evidence that was “better, more reliable and more comprehensive.”

89. That contention is not supported by an assessment of the record and, in any event, it does not provide a reason for attributing 'little weight' to the audio recordings and transcripts, but rather would go to the cumulative weight of the audio recordings and transcripts relative to all other evidence.
90. As well, there is no discussion in the reasons, or in the appeal submission of the Director, of what documentary evidence was considered "better, more reliable and more comprehensive."
91. There is in fact little evidence in the record that addresses the question of the appropriate weight to be given the audio recordings and transcripts. The sum and substance of the 'evidence' relating to the audio recordings and transcripts is found in three locations.
92. The first is in the submission made on behalf of AJ Boyal dated August 8, 2022, in response to the question from the investigating Delegate, asking "What say you about Mr. Boyal's admissions in the transcript?"
93. The submissions on this point appear to be comprised of impressions formed by counsel for AJ Boyal of the conversations on the audio recordings and a blanket denial of statements attributed to Mr. Boyal in the transcripts of the audio recordings.
94. The second is in the communication between the investigating Delegate and Mr. Mann in August 2022, which did no more than seek to confirm the identity of the parties to the telephone conversations caught on the audio recordings.
95. The third, to which I shall return later in this decision, is the cancelled cheques for \$7,500.00 which were discussed in one of the conversations that were recorded and transcribed.
96. Logically, none of that evidence provides a reason for ascribing 'little weight' to the audio recordings and transcripts or, more importantly, address their credibility.
97. The deciding Delegate focussed on the transcripts not being officially prepared by a third party, but as indicated above, there is no legal requirement of the sort referred to by the deciding Delegate and the absence of professionally transcribed audio recordings is not, of itself, a basis upon which to accord them 'little weight.'
98. Even if 'little weight' was given to the audio recordings and transcripts, the deciding Delegate was required to provide some reasons why the evidence of the conversations as transcribed were not accepted in favour of the blanket denials made by AJ Boyal. This was critical evidence for Mr. Singh and required greater analysis than what is found in the reasons: see *ARA Development Ltd., supra*.
99. However, in my view, on a reading of the Determination as a whole, the deciding Delegate did not give the transcripts 'little weight' but instead gave them no weight at all. In effect, having determined they were admissible, the deciding Delegate did not give the information they contained any consideration. I find the facts that the transcripts were "unofficial" and did not appear to have been completed by a third party, that AJ Boyal disputed them and the translation, and that there was other documentation the deciding Delegate believed she could rely on for her findings and analysis, does not justify giving the information contained in the transcripts no consideration at all. This is particularly so given the Determination notes the transcripts contained information which, on its face, appears to be directly

relevant to, and probative of, certain of Mr. Singh's allegations. As indicated above, I will discuss this point further below, when addressing his appeal of the dismissal of those allegations.

100. In result, I am persuaded there was both an error of law and a breach of principles of natural justice by the deciding Delegate relating to her assessment, conclusions, and consequent treatment of the audio recordings and transcripts.

### **Decision on the Record of Hours**

101. The deciding Delegate summarizes the characteristics of Mr. Singh's record of hours from July 19, 2018, to October 2019: that some of the records were handwritten and some were typed; that approximately half were on clock in/clock out forms with Mr. Singh's name at the top but with no reference to AJ Boyal; some of the records were difficult to read; Mr. Singh stated AJ Boyal had a clock in/clock out machine on the work premises (AJ Boyal denied there was ever such a machine on the premises); Mr. Singh provided pictures of clock in/clock out forms showing the location, date, and time each photo was taken for a period from May 6, 2019, to October 7, 2019.

102. AJ Boyal provided a record of Mr. Singh's hours of work from July 24, 2018, to September 15, 2019. That record of hours is described in the reasons as follows:

A J Boyal stated the employees record their hours each day on an employee register that is at the workplace. At the end of the month employees sign the register confirming their hours of work. This register is used by the accountant to prepare payroll. The Timesheets appear to have been a notebook that states the time in and time out with a column for total hours which is all handwritten and appears to have been kept contemporaneously. Mr. Singh's name is signed at the bottom of each month on the Timesheets. Although I am not a handwriting expert, the signing of Mr. Singh's name on the Timesheets is very similar to the signature on the clock in/clock out forms provided by Mr. Singh. AJ Boyal asserts it does not have a clock in/clock out machine on its premises.

103. The deciding Delegate preferred the record provided by AJ Boyal, finding them to be in a "consistent comprehensive format and appear to be the same notebook." The deciding Delegate refers to Mr. Singh's signature on the records AJ Boyal provided, finding, despite Mr. Singh's denial of never having seen or signed that record of hours, that Mr. Singh "most likely" signed his record of hours and those records were the most accurate and reliable evidence of Mr. Singh's hours of work.

104. It is trite to observe there was a direct and significant conflict in the evidence of the parties, yet once again, the deciding Delegate seems to have rejected all of Mr. Singh's evidence relating to his hours of work without any concern about, assessment of, or finding on his credibility, or that of his evidence, or the credibility of the evidence presented on this matter by AJ Boyal.

105. In my view, the deciding Delegate was not in a position to disbelieve Mr. Singh's evidence and record of hours and prefer AJ Boyal's, without holding an oral evidentiary hearing to resolve the dispute as to the material fact of which record of hours was accurate. This is because AJ Boyal's record of hours could not be found to be accurate without impugning the credibility of Mr. Singh, in particular his denial that it was his signature on AJ Boyal's record of hours. As the deciding Delegate acknowledged, she was not a handwriting expert. In the face of Mr. Singh's express denial that it was his signature, and having not

otherwise impugned the credibility of Mr. Singh, the deciding Delegate did not have a proper basis for rejecting Mr. Singh's evidence and preferring AJ Boyal's.

106. In my view, there were other elements relating to the record of hours that were not considered by the deciding Delegate, bear directly on the respective credibility of the parties, and raise several concerns with her decision to prefer the records provided by AJ Boyal.
107. Mr. Singh denied ever having seen the record of hours provided by AJ Boyal prior to the investigation and said, through counsel, the signature was not his. While the deciding Delegate obviously found his denial to be uncredible, she does not engage in any assessment of that denial as a credibility issue which would demand she consider that denial in light of *all* the evidence.
108. The deciding Delegate rejected the hours of work records provided by Mr. Singh because they were "not consistent," some of being handwritten in a notebook, some handwritten on clock in/clock out forms, and some typed on clock in/clock out forms. The deciding Delegate noted Mr. Singh had provided photos of his clock in/clock out forms for the last six months of his employment, but had provided no explanation why he did not have photos prior to May 6, 2019. However, that question was never asked by the investigating Delegate, so Mr. Singh had no opportunity to provide any explanation. If the deciding Delegate felt the lack of consistency, identified in the reasons, meant that the evidence Mr. Singh provided could not be trusted, that should have been put to Mr. Singh in a manner that allowed him to respond to the perception of the deciding Delegate about this evidence. It is a question of basic fairness. Absent such an opportunity being provided to Mr. Singh, the comments about the consistency of Mr. Singh's record of hours, are not reasons for rejecting them.
109. As well, the deciding Delegate identifies there were screen shots provided by Mr. Singh of his hours of work over a period of time, which were said to be taken, and were tagged as being taken, at AJ Boyal's worksite in Richmond. The reasons do not indicate whether the deciding Delegate accepted or rejected this evidence or, if it was accepted, why it apparently was given no effect and, if it was rejected, the reasons for that decision. In addition to setting out his hours of work, the screen shots indicate that Mr. Singh was at work around 8:00 am on some days and working until close to and after 10:00 pm on several occasions. These screen shots directly contradict an assertion by AJ Boyal that Mr. Singh could not have started work early or worked past closing because he had no key to the premises: see June 20, 2022, submission from counsel for AJ Boyal on page 4. This was another material conflict in the evidence which raised an issue of credibility that required an oral evidentiary hearing to resolve.
110. I find the submissions of Mr. Singh raised other issues of credibility and reliability with respect to the record of hours evidence of AJ Boyal which required an oral evidentiary hearing to resolve. I find it unnecessary to repeat the assertions set out in Mr. Singh's submissions. The question is not whether they would ultimately be found to have merit. The point is that the evidence was not on its face so reliable that it could be accepted despite the direct denials and contrary assertions of Mr. Singh, without an assessment of the credibility of the evidence of each party. To put it another way, there was no basis on which the deciding Delegate could have properly determined that Mr. Singh was not credible and AJ Boyal was credible, merely on the basis of the information contained in the Investigation Report.
111. The reasons given by the deciding Delegate, that Mr. Singh's record of hours was "not consistent," is an insufficient basis on which to ground a finding against Mr. Singh's records. It does not address the

credibility of those records in the context of all the evidence. The failure to consider relevant evidence in this case has such an impact on the fairness of the proceeding, the conclusion that there has been a breach of natural justice is unavoidable.

112. In sum, I find the deciding Delegate breached principles of natural justice by rejecting the evidence of Mr. Singh relating to his hours of work and accepting the evidence of AJ Boyal in circumstances that required an oral evidentiary hearing to resolve the material conflict in the evidence regarding the hours of work.

113. Both parties contended the evidence provided by the other was falsified, but neither party was given an opportunity to test the other's credibility in a hearing. Nor did the deciding Delegate, as a result, have a proper basis for determining which party was credible. The evidence was irreconcilable and only one party could be found credible.

#### **Decision on Alleged Breach of Section 10(1)**

114. The reasons for Determination notes that Mr. Singh alleged that he paid AJ Boyal \$25,000 to obtain his employment. It indicates he stated that in July 2018 he paid AJ Boyal \$10,000 in cash that he obtained from his parents in India, and he arranged for his cousin, who he named, to pay an individual, also named, \$15,000 in two cheque payments of \$7,500 each on August 2, 2018 and August 8, 2018. The reasons also note Mr. Singh provided copies of the cheque payments, and said he instructed his cousin to make the payments to the individual "because AJ Boyal owed him money" (p. R20). The reasons noted AJ Boyal simply asserted he did not receive any payment from Mr. Singh for obtaining employment.

115. The deciding Delegate then stated she found there was "insufficient evidence to show that Mr. Singh made payments to A J Boyal for obtaining his employment with them," noting that Mr. Singh had provided no evidence to support his assertion that he made a \$10,000 cash payment to AJ Boyal in 2018, and that neither of the cheques from the cousin to the individual "references Mr. Singh and/or A J Boyal" (p. R20). The deciding Delegate states that for these reasons, she does not find that AJ Boyal charged Mr. Singh a fee for employment, contrary to Section 10(1) of the *ESA*.

116. Clearly, in reaching this finding, the deciding Delegate was impugning the credibility of Mr. Singh. However, she did so not on the basis of evidence which contradicted Mr. Singh's story, but rather on the basis that Mr. Singh did not have sufficient supporting evidence. Mr. Singh's story was contradicted by AJ Boyal's denial of having received any payment from Mr. Singh. But there is no explanation why the denial was preferred over the assertion in the absence of an evidentiary hearing to test the credibility of each party.

117. Furthermore, in finding there was insufficient evidence to support Mr. Singh's story, the deciding Delegate did not address the information contained in the transcript and audio recording which the deciding Delegate had found to be admissible. The Determination states that in the second audio recording, Mr. Boyal confirmed "that Mr. Singh paid for the Labour Market Impact Assessment" (p. R3). The Determination notes that Mr. Boyal also denied the accuracy of the transcript and argued he was forced to say things. However, the deciding Delegate does not refer to this evidence or explain why it was not relevant to Mr. Singh's story that he had been made to pay for his employment, including by paying the \$15,000 cost of the LMIA. In my view, the deciding Delegate was required to grapple with this evidence and, in the circumstances, to hold an oral evidentiary hearing in order to resolve this dispute over material



facts, which could not be resolved without a basis for determining who was credible – Mr. Singh or Mr. Boyal.

118. Counsel for Mr. Singh has not sought to have the matter referred back to the Director for further investigation, but has requested several remedies that are either outside the jurisdiction of the Tribunal to grant or are unrealistic. The Tribunal is in no position to order the wages owed to Mr. Singh be ‘recalculated’ since the Tribunal is in no better position to make pronouncements on the evidence than the deciding Delegate. The unresolved credibility issues effectively foreclose that.

119. The submission of counsel for Mr. Singh makes a reference in his submission to the need for an oral hearing, but has not sought that result as a remedy.

120. A party is not absolutely entitled to an oral hearing before the Director or her delegates. That said, the Tribunal can compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. Both circumstances arise here. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the of the evidence and issues.

121. While I do not wish to be taken as suggesting that an oral complaint hearing must inevitably be held where credibility issues arise, in this case, credibility issues were at the centre of the dispute between the parties and coloured every issue that was before the deciding Delegate for determination.

122. The question is whether the refusal or failure to conduct an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice and I have found it has.

123. I am of the view that in the circumstances, this case demanded an oral hearing. I see no prospect the credibility issues that are central to this complaint can be fairly resolved through an investigation and document review alone.

124. Although it is unnecessary in light of the conclusions I have reached on the natural justice arguments, I shall briefly address the other arguments made by Mr. Singh in his appeal.

### **Vulnerabilities of Migrant Workers**

125. Accepting Mr. Singh is a vulnerable worker does not alter the burden of proof, would not justify findings of fact that are not supported by evidence, nor justify wholesale adjustments to the application of the statute to a complaint or to long established principles applied to adjudicating complaints.

126. There is no evidentiary basis for finding the investigating or the deciding Delegates effectively imposed a higher burden on Mr. Singh *because* he is a vulnerable worker.

**Undue Delay**

127. There undoubtedly has been inordinate delay in processing Mr. Singh complaints, but clearly Mr. Singh would not want his complaint dismissed on that basis. Nor, of course, can it be granted on that basis.
128. I see nothing constructive that could be accomplished by granting the declaration sought.

**Mandatory Administrative Penalties**

129. Mr. Singh has not shown the alleged failure to impose administrative penalties for a contravention of sections 18 and 58 of the *ESA* is either appealable or, if so, is a reviewable error: see *Ulrike Roth and Benoit Brochu*, 2020 BCEST 44, paras. 82-91; and *Raed Eid*, 2020 BCEST 45, paras.19-20.

**ORDER**

130. Pursuant to section 115(1)(b) of the *ESA*, I order the Determination dated June 23, 2023, be cancelled and the matter be referred back to the Director for a fresh investigation, which in the circumstances should include an oral hearing.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**