An appeal

- by -

Franco Yiu Kwan Orr
("Orr")
- and -
Oi Ling Nicole Huen
("Huen")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2012A/155

DATE OF DECISION: June 19, 2013

DECISION

SUBMISSIONS

Robert W. Richardson	counsel for Franco Yiu Kwan Orr and Oi Ling Nicole Huen
Ai Li Lim	counsel for Leticia Macaranas Sarmiento
Joy Archer	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by legal counsel on behalf of Franco Yiu Kwan Orr ("Orr") and Oi Ling Nicole Huen ("Huen") – I shall refer to them jointly as the "appellants" – under subsections 112(1)(a), (b) and (c) of the *Employment Standards Act* (the "*Act*") and it concerns a determination issued on November 23, 2012, pursuant to which the appellants were ordered to pay their former employee, Leticia Macaranas Sarmiento ("Sarmiento"), $30,662.90 on account of unpaid wages and section 88 interest (the "Determination").

2. In addition, and also by way of the Determination, the delegate levied 7 separate $500 monetary penalties (see section 98) against the appellants based on their contraventions of sections 17 (semimonthly payment of wages), 18 (payment of wages on termination of employment), 27 (provision of wage statements), 28 (keeping payroll records), 40 (overtime pay), 45 (statutory holiday pay) and 46 (payment for working on a statutory holiday) of the *Act*. Thus, the total amount payable under the Determination is $34,162.90.

3. Pursuant to sections 103 of the *Act* and 36 of the *Administrative Tribunals Act*, I am adjudicating this appeal based on the parties' written submissions and, in that regard, legal counsel for the appellants and legal counsel for Ms. Sarmiento have both filed submissions on behalf of their respective clients as has the delegate who issued the Determination (the "delegate"). In addition, I have reviewed the section 112(5) "record" that was before the delegate when she issued the Determination (405 pages).

THE DETERMINATION

4. The appellants originally employed Ms. Sarmiento in Hong Kong under a written agreement dated June 12, 2007, (and for a 2-year term) as a live-in caregiver or "nanny". The appellants arrived in Canada along with Ms. Sarmiento in early September 2008 and she continued on in their service as a live-in caregiver until mid-June 2010. The appellants arrived in Canada with their three children and Ms. Sarmiento and took up residence with Ms. Huen's parents and her brother in a home in Vancouver.

5. On December 2, 2010, the West Coast Domestic Workers' Association (the "WCDWA") filed an unpaid wage complaint under section 74 of the *Act* on Ms. Sarmiento's behalf. The unpaid wage claim totalled approximately $34,700 for the 6-month period from December 13, 2009, to June 13, 2010. During most of the duration of the delegate's investigation the appellants represented themselves although they retained legal counsel for this appeal. The appellants retained counsel about 4 months before the Determination was issued.

6. Although the matter was originally scheduled for a complaint hearing, that hearing did not proceed and, as noted above, the delegate ultimately investigated this complaint. On November 23, 2012, the delegate issued

the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). The delegate awarded Ms. Sarmiento unpaid regular wages ($4,213.38), overtime pay (at $21,492 the single largest component of the award), statutory holiday pay ($1,024), vacation pay ($1,573.08), compensation for length of service ($640) and section 88 interest ($1,720.44).

7. The delegate determined that Ms. Sarmiento was employed by both appellants, that she was paid $700 per month (a figure below the applicable $8 per hour minimum wage), that she consistently worked 15 hours per day/7 days per week, and that she was not paid in accordance with the overtime, statutory holiday and vacation pay provisions of the *Act* throughout the December 14, 2009, to June 13, 2010, wage recovery period (see section 80).

REASONS FOR APPEAL

8. The appellants have raised all three statutory grounds in the appeal, namely, they allege that the delegate erred in law (112(1)(a)), failed to observe the principles of natural justice in making the Determination (112(1)(b)) and that they now have evidence that was not available when the Determination was being made (112(1)(c)). Although the appellants' legal counsel did not separately classify his 16 alleged "errors" under each statutory ground of appeal, I have grouped these alleged errors under each statutory ground although I acknowledge that some of these errors might be classified as both errors of law and natural justice breaches.

9. The alleged natural justice breaches are largely predicated on the fact that the delegate investigated the complaint rather than convening a complaint hearing, but also raise issues regarding the delegate's section 77 obligation and the nature of the evidence the delegate relied on in making the Determination. Counsel says:

- "1. The Director erred in making the Determination upon a record which contained no evidence from the Complainant herself";
- "4. The Appellants are unfairly compromised because the full record has never been disclosed to them";
- "5. The Director erred in not ordering the Complainant to tender critical evidence in her possession of [sic, or] control";
- "6. The Director erred in allowing its discretion to be fettered";
- "7. The Delegate erred in not conducting an oral hearing, despite finding that credibility of the parties was at issue"; and
- "8. The Delegate erred in not allowing cross-examination of the Complainant."

10. The alleged errors of law largely concern the delegate's findings of fact:

- "2. The Director erred in making serious findings not sought by the Complainant, and did so without any evidence";
- "3. The Director erred in making findings wholly outside the scope of the Act and the Director's authority";
- "9. The Director erred in holding held [sic] the parties to different evidentiary burdens of proof";
- "10. The Director erred in concluding the Complainant was not able to return to Asia, when the only filed evidence was to the contrary";
- "11. The Director failed to turn its mind to evidence on the record which was clearly determinative of matters at issue";

- "12. The delegate erred in finding most of the Complainant's waking hours were working hours";
- "13. The Director erred in finding that the Complainant was entitled to pay while she knowingly and willingly was illegally in the country";
- "14. The Director erred in not discontinuing the investigation when requested by the Appellants"; and
- "15. The Director erred in misunderstanding the nature of credibility and confusing it with fact-finding".

11. The ground of appeal that counsel has characterized as "16. Further Evidence" does not, in my view, fall within the ambit of subsection 112(1)(c) – the "new evidence" ground – of the *Act* and is more appropriately characterized as an alleged breach of the principles of natural justice. Counsel says: "The Tribunal should direct the Complainant to provide evidence in her own possession and control which goes to the heart of the issues and could lead a [*sic*] different decision". Counsel continues: "It is a breach of natural justice if the delegate fails to interview witness [*sic* – counsel is referring to Ms. Sarmiento] who has relevant and potentially positive evidence".

SUMMARY DISMISSAL OF CERTAIN GROUNDS OF APPEAL

12. Section 114 of the *Act* gives the Tribunal a discretionary authority to "dismiss all or part of the appeal" if, *inter alia*, "the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process" (subsection 114(1)(c)) or "there is no reasonable prospect that the appeal will succeed" (subsection 114(1(f)). In my view, several of the appellants' reasons for appeal – namely, those numbered 2, 3, 10, 13 and 14 – fall within one or both of these subsections and I will now briefly address these matters.

13. In support of their second and third appeal grounds, the appellants assert that the delegate exercised a "criminal law" jurisdiction and "summarily found the Appellants had forged the Complainant's signature". Further, the appellants say that this finding shows that the delegate was biased against them. This assertion arises from the delegate's discussion, at pages R34 – R35 of her reasons, regarding the circumstances relating to the renewal of Ms. Sarmiento's visitor's visa. Ms. Sarmiento's position was that she did not apply to have the visa renewed when it expired and that the signature on the visa renewal application was not her signature and that the appellants must have signed it on her behalf without her knowledge or consent. The delegate simply accepted the position, advocated by Ms. Sarmiento's legal counsel on her behalf, that she did not sign the renewal application. Whether this finding was correct is a separate issue from the question of whether the delegate was entitled to make a finding on the point. However, in my view, the delegate did not exercise any "criminal jurisdiction" in making that finding – this finding cannot form the basis for any criminal conviction of the appellants regarding this matter and even if the appellants were to be charged with "forgery", the delegate's finding would not create any sort of "issue estoppel" binding a criminal court. Further, one cannot extrapolate from an adverse finding of fact against a party that the delegate was biased against that party.

14. Similarly, I find the appellants' reason for appeal relating to whether or not Ms. Sarmiento was able to return to Asia using an airline ticket the appellants supposedly purchased for her (No. 10), to be inconsequential. Whether the appellants actually booked airline tickets for Ms. Sarmiento (and the delegate found that the appellants did not provide any such proof – see page R26), so that she might leave their employ and return to the Philippines, is simply irrelevant. The simple fact is that the delegate determined that Ms. Sarmiento did not leave their employ in June 2009 but continued on until June 13, 2010.

15. In support of their appeal ground No. 13, counsel for the appellants says: "the Complainant … knew her employment contract had ended, that her visa status has expired, and yet who refused to leave the home or

the country". The delegate did *not* find that the appellants demanded that Ms. Sarmiento leave their home and employ and that she adamantly refused. In any event, however, counsel has not submitted any argument or authority supporting his assertion that if Ms. Sarmiento was "illegally" in the country – and I am not at all certain, based on the record before me, that was the situation – that somehow created a legal bar to her *Act* unpaid wage complaint. I am not aware of any legal authority supporting that proposition.

16. The final ground of appeal I propose to summarily dismiss concerns the appellants' argument that the delegate should have discontinued the investigation once they asked her to do so (No. 14). Subsection 76(3)(f) states that the Director of Employment Standards may "postpone … investigating … a complaint if … (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator". The appellants' counsel referred to, but did not provide a copy of, a "parallel Supreme Court civil action as to identical subject matter, Sarmiento v. Orr and Huen, B.C.S.C. Vancouver Registry Action No. 117323" (underlining in original text) and states that this action has now been set for trial. Counsel referred to this action as a "duplicitous proceeding" and says that the delegate breached the principles of natural justice when she failed to discontinue her investigation and failed to give reasons for pressing on with the investigation.

17. Since counsel did not submit a copy of the B.C. Supreme Court Notice of Claim, I am unable to discern to what extent, if at all, there is an overlap between the issues addressed in the Determination and the claims filed in the B.C. Supreme Court. However, it should be noted that the B.C. Supreme Court does not have any jurisdiction to adjudicate statutory claims for overtime pay (by far, the largest single wage claim addressed in the Determination) and statutory holiday pay (see *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, leave to appeal to the Supreme Court of Canada refused: 2008 CanLII 53790). Accordingly, at least with respect to those claims, there cannot be any "parallel" or "duplicitous proceeding". Further, section 80 of the *Act* limits the employer's "backpay" liability to 6 months dating from the employment termination date whereas a claim in the B.C. Supreme Court is not so limited; it may be that Ms. Sarmiento is claiming unpaid wages relating to a different time period, or is advancing claims that are not available under the *Act* (such as damages in lieu of reasonable notice, aggravated damages and punitive damages) in her B.C. Supreme Court action. Regardless of the particulars concerning her B.C. Supreme Court Claim, I cannot conclude that the delegate improperly exercised her discretion in deciding to proceed with her investigation simply because there was a separate claim filed in the B.C. Supreme Court that in some fashion also relates to her employment by the appellants.

18. Having summarily dismissed the appellants' reasons for appeal that I consider to be, on their face, wholly misconceived, I shall now turn to what I consider to be the appellants' strongest arguments, namely, whether the delegate erred in law or otherwise failed to observe the principles of natural justice in, firstly, deciding to cancel the scheduled June 2, 2011, complaint hearing and proceed by way of an investigation and, secondly, whether the investigation was so tainted by legal errors or other natural justice breaches that the Determination must be cancelled and a new hearing ordered.

DID THE DELEGATE ERR IN CONDUCTING AN INVESTIGATION RATHER THAN A COMPLAINT HEARING?

19. The appellants reasons for appeal numbered 6 through 8 all address, in one way or another, whether it was appropriate for the delegate to cancel the scheduled June 2, 2011, complaint hearing and, in effect, convert the decision-making process from an evidentiary hearing at which the delegate would preside as a neutral arbiter, into a fact-finding and adjudicative investigation conducted by the delegate.

20. There are, of course, very significant differences between a complaint hearing and an investigation. The delegate's role at a complaint hearing is that of neutral arbiter and it is the parties' responsibility to ensure that they bring to the hearing any witnesses, documents or other evidence they wish the delegate to consider. Witnesses typically testify under oath or affirmation and are subject to cross-examination. In essence, a complaint hearing proceeds much like an ordinary civil trial. A delegate conducting an investigation has a dual role, namely, that of fact-finder and adjudicator, and throughout the investigation the delegate is acting in quasi-judicial capacity (see *BWI Business World Incorporated*, BC EST #D050/96; *Insulpro Industries Inc.*, BC EST # D405/98, and *Whitaker Consulting Ltd.*, BC EST # D033/06 at paras. 33 *et. seq.*).

21. As noted earlier, a staff lawyer with the WCDWA filed the *Act* complaint on Ms. Sarmiento's behalf and throughout the WCDWA's submission attached to the complaint form, Ms. Sarmiento was identified as the lawyer's client. On April 7, 2011, the Employment Standards Branch forwarded a "Notice of Complaint Hearing" to the parties advising that the hearing would proceed at 9:30 AM in Langley on June 2, 2011. This complaint hearing was subsequently cancelled. The delegate's explanation for the hearing cancellation, recounted at page R25 of her reasons, is as follows:

> Originally the dispute between Ms. Sarmiento and the Employers [the appellants] was scheduled to be heard via complaint hearing on June 2, 2011 [*sic*]…Due to unrelated legal matters between the parties and the issuance of a restraining order the Director made the decision for the issues to be heard and a determination to be made by way of an investigation.

22. The record before me indicates that the Employment Standards Branch unilaterally decided to cancel the complaint hearing and never sought any submissions from the parties regarding the alternative investigation/adjudication process. On June 29, 2011, the delegate sent an e-mail to both the WCDWA and the appellants that simply stated "the file has been reassigned as an investigation" and that a "fact finding session" was scheduled for July 13, 2011 at the Employment Standards Branch's Langley office. A "Notice of Fact Finding Meeting" was issued on June 29, 2011, but it appears from the record that this meeting was adjourned and, in fact, never occurred. I note that the delegate, in her submission to the Tribunal, stated: "As the process chosen by the Director was an investigation via written submissions, cross-examination was not an option as the parties did not attend an oral hearing or a fact finding session." The record before me also includes documents indicating that both appellants were charged under subsections 117(1) and 118(1) of the federal *Immigration and Refugee Protection Act* (these provisions, in general terms, create offences regarding inducing or coercing a person to enter Canada illegally). On May 25, 2011, the appellants were released on a "recognizance of bail" that included a provision that they have "no contact directly or indirectly with Leticia Sarmiento" and two other named individuals. The appellants' criminal trial in relation to these charges commenced in late May of this year.

23. The decision to cancel the oral hearing appears to have been predicated on the "no contact" order. This appears clear from the delegate's reasons and the delegate confirmed as much in her submission in these proceedings: "In this case, the Director decided that, in light of the no contact order and other legal issues, this investigation was best conducted via written submissions." So far as I can determine, Ms. Sarmiento's legal counsel never asked the delegate to cancel the oral hearing and, indeed, in response to the delegate's notice regarding the "Fact Finding Meeting", Ms. Sarmiento's counsel indicated that she would be attending that meeting with her client and, possibly, a Tagalog interpreter. I am not persuaded that the "no contact" order constituted an absolute bar to the complaint hearing proceeding and the only reasonable inference I can draw from Ms. Sarmiento's counsel's advice regarding her client's attendance at the "Fact Finding Meeting", is that she also believed the "no contact" order did not prohibit the Employment Standards Branch from holding an adjudicative proceeding at which both parties attended. As a general rule, "no contact" orders usually expressly exclude contact incidental to appearing in a civil proceeding between the same parties and,

accordingly, had a complaint hearing been scheduled, the no-contact order could likely have been varied in advance of the hearing (see, *e.g.*, *R. v. Valente*, 2010 BCPC 213 at para. 43).

24. Counsel for the appellants says that the delegate unreasonably fettered her discretion when she decided to cancel the complaint hearing because of the no contact order. Counsel notes that he was denied an opportunity to hear Ms. Sarmiento's testimony and to cross-examine her. He further notes that this case turned, to a significant degree, on the parties' relative credibility and since both parties were only able to provide their evidence in written form, the delegate was very poorly positioned to make essential credibility findings. Clearly, the parties' relative credibility featured prominently in this case.

25. The delegate noted that "there was a large amount of evidence and information received from the parties" (page R25) and that, due to the conflict in the various statements submitted by the parties, there was an "issue with respect to the credibility of the evidence of each of the parties, and more specifically they raise the issue of whose evidence I prefer" (page R27). The delegate then proceeded to examine the credibility issue relying, at least in part, on the tools that a decision-maker who had the benefit of oral testimony and cross-examination would utilize – for example, the delegate referred to the witnesses' demeanour, whether their evidence was consistent, "the manner of the parties (for example, if the parties are clear, forthright and convincing or evasive and uncertain)" and their ability to recall details. The delegate then concluded (page R27): "I found Ms. Sarmiento's submissions and statement to be believable, consistent, coherent, detailed and reasonable [and it] was presented in a clear, consistent, forthright and convincing manner, and she did not waiver in her position at all at least in response to the duties she claimed to perform and the time it took to perform them".

26. The principal concern I have regarding the delegate's credibility determination is that Ms. Sarmiento herself never provided any *direct* evidence in her own right and it would appear that the delegate never interviewed her. As Counsel for the appellants notes: "To the Appellants' knowledge, there is no evidence on the record from the Complainant herself. She tendered an affidavit from a friend. The rest of the record … is entirely the submissions of legal counsel for the association intervening on behalf of the Complainant". I have carefully reviewed the record and there is not a single statement, sworn or unsworn, from Ms. Sarmiento herself. Her entire case consists, as counsel for the appellants' stated, of a 3-page affidavit from Ma. Theresa Velasco (although she said she was not a "close friend" of Ms. Sarmiento) that appears to have been drafted by Ms. Sarmiento's legal counsel, and three separate submissions (December 2, 2010, July 29 and August 9, 2011) from her legal counsel. These submissions are repeatedly framed using phrases such as "Ms. Sarmiento informs me", "according to Ms. Sarmiento", "Ms. Sarmiento agrees with/denies" some particular point. This latter "evidence" is entirely hearsay and given that it was drafted by legal counsel, it hardly seems surprising that these statements are well organized, clear, consistent and detailed and, in consequence, probably convincing – that does not mean, however, that these lawyer-scripted statements attributed to Ms. Sarmiento are inescapably truthful.

27. My review of the record indicates that whenever the delegate required information from Ms. Sarmiento, she contacted her WCDWA counsel (usually by e-mail) and simply requested that counsel provide certain information – so far as I can determine, at no time during the investigation did the delegate ever obtain any information from Ms. Sarmiento directly. The record indicates that the delegate never spoke with Ms. Sarmiento directly either in person or by telephone. Ms. Sarmiento's entire testimony was sought from, and filtered through, her legal counsel and thus, in my view, Ms. Sarmiento's credibility could not be adequately assessed (see *Whitaker Consulting Ltd.*, BC EST # D033/06 esp. para. 44).

28. The delegate, in her submission, states that the WCDWA was "not acting as legal counsel for the complainant" and that the submissions it filed on Ms. Sarmiento's behalf "were Ms. Sarmiento's submissions

and not legal submissions". These statements are belied by several representations contained in the WCDWA submissions – for example, "I am writing in my capacity as Staff Lawyer at WCDWA on behalf of my client, Leticia Macaranas Sarmiento". The WCDWA submissions include statements regarding Ms. Sarmiento's position as to the relevant facts as well as her counsel's submissions regarding the governing legal principles. In my view, it is simply not tenable to suggest that the WCDWA submissions are not, at least to a significant degree, "legal submissions".

29. Further complicating the delegate's conclusions regarding the parties' comparative credibility is the fact that the delegate misconceived that nature of some of the statements submitted by, or on behalf of, the appellants. At page R28 of her reasons, the delegate noted that several of the statements submitted by the appellants from various witnesses were "not statements given under oath (although Mr. Orr was instructed to provide sworn statements)" and that she was giving them "little weight". There are two problems here. First, the appellants' witnesses' statements *were* given by affirmation before a notary public and thus stood on the same evidentiary footing as a "sworn" statement given under oath. Second, I am wholly unable to understand why the delegate would have apparently demanded that the appellants provide "sworn" statements when, clearly, Ms. Sarmiento was not asked to do so.

30. As previously noted, the appellants' current legal counsel was not retained when the investigation first got underway but he wrote to the Employment Standards Branch (Langley) on July 24, 2012, and asked that the appellants "be permitted the due process of meeting the allegations fully, on oral evidence" and on October 9, 2012, he once again wrote the Branch asking for a response to his earlier July 24 letter. Counsel says that the delegate "wholly ignored the request [to make oral submissions] without response and issued the Determination on November 23, 2012". My review of the record confirms that the delegate did not reply to the appellants' counsel's request. The delegate now says:

> At the time the appellants obtained legal representation (and a request for an oral hearing was made) the investigation was complete, final submissions had been received by and exchanged between the parties and the decision, although not released, was substantially written. To revert back to an oral hearing would in fact be a serious breach of natural justice …
>
> Whether credibility is at issue or not, once again the discretion lies with the Director in determining the best way to proceed with an investigation. Parties do not have to be before the Director's Delegate in person to be able to appropriately and effectively assess credibility.

31. The delegate's assertion that "the investigation was complete" and the decision "was substantially written" as of July 24, 2012 (the date of the appellants' counsel's initial letter to the delegate requesting an oral hearing) strikes me as surprising in light of the fact that the Determination was not issued until November 23, 2012 – almost exactly 4 months after the delegate's "decision … was substantially written". I note that the delegate eventually replied to the appellants' counsel by way of an e-mail but only on December 6, 2012 (2 weeks after the Determination was issued). In her e-mail, the delegate restated her current position that an oral hearing could not be held since the Determination was "substantially written" when the original request for an oral hearing was made.

32. While I agree with the delegate's submission that, in some circumstances, credibility can possibly be assessed in the absence of an oral hearing where parties give direct evidence and are subject to cross-examination, I am not persuaded that this was such a case. I particularly say this because of the stark contrast in the evidence before the delegate, coupled with the fact that Ms. Sarmiento's entire evidence consisted of hearsay statements prepared and tendered by her legal counsel. In addition, there was a dearth of independent evidence that could be relied on to assess the relative credibility of the parties and their witnesses.

33. In addition, in my opinion, the delegate made some fundamental errors regarding her consideration of the evidence. For example, and as previously noted, the delegate rejected some of the witness statements tendered by the appellants because, *inter alia*, they were not "sworn" when, in fact, they were affirmed before a notary public and thus had the same legal status as statements given under oath. Secondly, the delegate concluded that Ms. Sarmiento did not sign her visa renewal application because, even to her "untrained eye", this signature did not appear to match the signature on the *Act* complaint form. These two signatures do not strike me as being so clearly dissimilar that I could unequivocally conclude they are not the signatures of the same individual. But that is not the point – where the signatures are not obviously from separate individuals, a decision-maker should refrain from drawing any sort of conclusion regarding authenticity without the benefit of other probative evidence (say, from a qualified forensic document examiner who had an opportunity to examine the *original* documents). Finally, I fail to see how the delegate could draw any conclusions regarding Ms. Sarmiento's credibility when her entire testimony was given by way of hearsay statements prepared by her legal counsel.

34. In this case, as in *Enviro Surface Care Ltd.*, BC EST # D037/10, the appellants' counsel sought an oral hearing and this request was simply ignored even though the parties' credibility was a central feature in the case. Indeed, it is hard to imagine a case where the parties could be further apart in terms of their respective views of the actual facts. In *Enviro Surface*, the Tribunal referred the matter back to the Director for an oral hearing and I think that is the only appropriate order to be issued in this case (see also *C & W Salvage Ltd.*, BC EST # D103/12).

35. In light of my view that this matter ought to be returned to the Director to be heard afresh by way of an oral complaint hearing, I do not think it appropriate for me to comment on any of the other reasons for appeal advanced by appellants' counsel particularly since many of counsel's concerns are now moot given that the matter will be referred back to the Director for an oral hearing.

36. There is one final issue that I must address, namely, whether the matter should be referred back to the Director for a hearing before a new delegate. In my view, this matter must be referred back for an oral complaint hearing before a new delegate (see *Oster*, BC EST # D120/08, and *Director of Employment Standards and Old Dutch Foods Ltd.*, BC EST # RD115/09). The delegate made certain credibility findings adverse to the appellants without a proper evidentiary foundation and, in some cases, after having misconceived the nature of the evidence before her. The delegate, in her submission to the Tribunal in this appeal, voiced some criticisms of the appellants and raised points to support the Determination that were not addressed in her reasons and, to an albeit limited degree, engaged in advocacy for the complainant rather than an explanation of the basis for the Determination. Finally, the delegate in her submission suggested that the appeal was filed for an improper purpose, namely, "to avoid paying the wages that were found to be owed to the complainant". In light of these circumstances, I believe that Ms. Sarmiento's complaint should be the subject of an oral hearing before a new delegate.

37. The delegate conducting the new hearing should take cognizance of the Supreme Court of Canada's decision in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 to the extent that the appellants' ongoing criminal trial results in facts being determined that might impact the outcome of the complaint hearing. The appellants, for their part, should take cognizance of the fact that the matters I have summarily dismissed as being unsound in law are not to be re-litigated in the complaint hearing (for example, whether Ms. Sarmiento's residency status bars her right to pursue an *Act* claim for unpaid wages).

ORDER

38. Pursuant to section 115 of the *Act*, the Determination is cancelled. Ms. Sarmiento's unpaid wage complaint is referred back to the Director so that it may be the subject of an oral complaint hearing before a new delegate.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal