

Citation: Salvador Gomez- Borja  
2025 BCEST 5

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Salvador Gomez-Borja

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.  
SUBMISSIONS: Andres Caicedo, on behalf of Savador Gomez-Borja  
FILE NUMBER: 2024/122  
DATE OF DECISION: January 9, 2025

## DECISION

### OVERVIEW

1. This appeal concerns a determination made under section 81 of the *Employment Standards Act (ESA)* on August 13, 2024 (the “**Determination**”) regarding a complaint filed by Salvador Gomez-Borja and Pedro Avila Angel (collectively the “**Complainants**”) against Baljit Gill (the “**Employer**”). The Complainants alleged several contraventions of the *ESA*, including failure to pay wages consistent with the work performed, non-payment of overtime wages and statutory holiday pay, and misrepresentation of the type of work, employment conditions, and wage rate.
2. The Complainants worked on the Employer's farm in Oliver, British Columbia, during the spring of 2022. Mr. Gomez-Borja was employed from March 17, 2022, to May 13, 2022, and Mr. Angel from April 2, 2022, to May 13, 2022. Although their employment agreements classified them as agricultural workers, the Complainants alleged that they were required to perform non-agricultural construction-related tasks for a portion of their employment without appropriate compensation.
3. A delegate (the “**Investigator**”) of the Director of Employment Standards (the “**Director**”) conducted an investigation, summarizing the evidence and arguments in an Investigation Report (**IR**), which both parties reviewed and responded to. Another delegate of the Director (the “**Delegate**”) subsequently issued a determination based on the IR and the submissions received, addressing the following issues:
  - a. Whether the Complainants were "farm workers" as defined by section 1(1) of the *Employment Standards Regulation* (the “**Regulation**”).
  - b. The Complainants’ applicable rates of pay.
  - c. Whether the Employer misrepresented the type of work, employment conditions, or wage rate.
  - d. Whether the Complainants were entitled to overtime wages and statutory holiday pay.
4. The Delegate concluded that the Complainants were “farm workers” as defined by the *Regulation*, determining that their primary duties were farm-related despite claims of construction work, as supported by the evidence. The Delegate also found that the Complainants’ rate of pay was in compliance with the agreed terms between the parties and the minimum wage rate set by the *ESA*, regardless of whether they were farm workers or construction laborers. Furthermore, the Delegate determined that there was no misrepresentation by the Employer regarding the type of work or compensation, as the evidence did not support such allegations. Finally, the Delegate ruled that the Complainants were not entitled to overtime or statutory holiday pay, as farm workers are exempt from these entitlements under the *Regulation*.
5. Mr. Gomez-Borja appeals the Determination on two primary grounds: error of law and breach of natural justice. The submissions on appeal are identical to the submissions of Mr. Angel in his appeal filed at the same time. Under the error of law ground, Mr. Gomez-Borja argues that the Director misclassified the Complainants’ employment duties, failing to recognize their principal work as construction rather than farm labour, despite video evidence and admissions from the Employer. He

further contends that the Director improperly evaluated evidence, imposed an unreasonable burden of proof, and failed to assess wage disparities arising from this misclassification. Additionally, Mr. Gomez-Borja challenges the adequacy of the investigation by the Integrity Services Branch of Employment and Social Development Canada (**ESDC**), asserting it was delayed, unreliable, and failed to account for contradictory claims by the Employer regarding the scope and nature of the Complainants' work. Under the natural justice ground, Mr. Gomez-Borja alleges procedural unfairness, citing inadequate disclosure of evidence, insufficient time to respond, and bias in the investigation. He highlights the Investigator's dismissal of critical evidence, hostility toward the Complainants' representatives, and refusal to contact witnesses, including the Mexican Consulate, which he argues demonstrated bias and compromised procedural fairness.

6. For the following reasons, I conclude that the appeal has no reasonable prospect of success. Mr. Gomez-Borja has failed to demonstrate that the Director made an error in law or breached the principles of natural justice. Accordingly, I dismiss the appeal without seeking submissions from the other parties, pursuant to section 114(1)(f) of the *ESA*.

## ISSUE

7. Has Mr. Gomez-Borja demonstrated a reasonable prospect of success in arguing that the Director's handling of the evidence: (i) involved an error of law; or (ii) constituted a breach of the principles of natural justice?

### **Has Mr. Gomez-Borja shown the Director erred in law in its handling of the evidence the parties submitted?**

8. The grounds of appeal are governed by subsection 112(1) of the *ESA* which limits appeals to 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
9. An appeal is not a rehearing of evidence or an opportunity to challenge the findings of fact reached by the Director or her delegates. Instead, it is an error correction process, where the appellant bears the burden of establishing an error under one of the statutory grounds of appeal outlined in section 112(1) of the *ESA*. Findings of fact made by the Delegate, if supported by evidence, are not subject to review unless they amount to an error of law.
10. The Tribunal has consistently adopted the definition of "error of law" as articulated in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.), which includes the following:
  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.

11. Under the “error of law” ground of appeal pursuant to section 112(1)(a) of the *ESA*, Mr. Gomez-Borja presents several arguments, each of which is addressed under the following headings.

### **(i) Misclassification of Employment Duties**

12. Mr. Gomez-Borja argues that the reassignment of his duties from farm work to construction work constituted a breach of his employment contract. He contends that the Delegate erred in law by failing to recognize construction tasks as his principal duties. However, the Delegate thoroughly examined the evidence, including the employment agreement, testimonies from both parties, the IR, and the responses of the parties to the IR, and concluded that Mr. Gomez-Borja was employed primarily as a farm worker.

13. While Mr. Gomez-Borja submitted video evidence and referenced admissions by the Employer, the Delegate found that the construction-related tasks performed did not alter the fundamental nature of Mr. Gomez-Borja's role as a farm worker. This conclusion was reasonably supported by the totality of the evidence presented.

14. Mr. Gomez-Borja's appeal primarily challenges the weight and interpretation of the evidence rather than identifying a true error of law. Under the principles established in *Gemex, supra*, an error of law must pertain to a misapplication of legal principles, not to factual disagreements. Accordingly, Mr. Gomez-Borja's disagreement with the Delegate's factual findings does not meet the threshold for establishing an error of law.

### **(ii) Improper Evaluation of Evidence**

15. Mr. Gomez-Borja asserts that the Delegate imposed an unreasonable burden of proof on the Complainants and dismissed video evidence as unrepresentative of the work Mr. Gomez-Borja did during the material period in question. The section 112(5) record and the Reasons for the Determination confirm that the Delegate considered the video evidence but found it insufficient to establish that construction became the Complainants' primary work.

16. A finding of fact will only constitute an error of law if it is based on an unreasonable view of the facts. In this case, the Delegate's conclusions were reasonable and supported by the totality of the evidence, including testimony and the nature of the employment agreements.

### **(iii) Wage Disparity**

17. Mr. Gomez-Borja argues that he suffered financial losses from being paid as a farm worker rather than as a construction worker. However, the Delegate found that the Complainants were properly classified as farm workers and that their wages complied with both the agreed-upon terms and

minimum wage regulations. I find that these findings of fact were open to the Delegate based on the evidence and do not establish an error of law.

**(iv) Inadequacy of the ESDC Investigation**

18. Mr. Gomez-Borja submits that the investigation conducted by the Integrity Services Branch of ESDC was delayed and pre-announced, undermining its reliability. The Delegate, however, considered the investigation alongside other evidence. Mr. Gomez-Borja's arguments about the reliability of the investigation pertain to the weight assigned to the evidence, not a legal error.

**(v) Contradictory Claims by the Employer**

19. Mr. Gomez-Borja highlights inconsistencies in the Employer's statements about the nature and duration of the construction work. These inconsistencies were acknowledged by the Delegate, who ultimately weighed the conflicting evidence and concluded that Mr. Gomez-Borja's principal duties remained agricultural. This conclusion was within the Delegate's fact-finding role and does not demonstrate an unreasonable interpretation of the evidence or an error of law.
20. Having reviewed the submissions of Mr. Gomez-Borja under the error of law ground of appeal, I find that Mr. Gomez-Borja has not demonstrated that the Director erred in law in the handling of the evidence. The arguments advanced under this ground of appeal primarily reflect a disagreement with the findings of fact made by the Delegate. The law governing appeals does not allow for a reweighing of evidence or a substitution of factual findings unless the findings are so unreasonable as to constitute an error of law. This case does not meet that standard.

**Has Mr. Gomez-Borja shown the Director breached the principles of natural justice in handling of the evidence the parties submitted?**

21. In determining whether the Director breached the principles of natural justice, the Tribunal adheres to established legal principles. Natural justice ensures procedural fairness, requiring that parties have an opportunity to know the case against them, present their evidence, and be heard by an independent and unbiased decision-maker. These principles were summarized in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

... the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party.

22. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. The Tribunal has also clarified that it is not a breach of natural justice to make a finding on the evidence that does not accord with one party's position (*BWI Business World Incorporated*, BC EST # D050/96). Where the elements of natural justice—opportunity to present a case, respond to evidence, and be heard—are present, it is unlikely a determination will be found deficient.

### **(i) Procedural Unfairness**

23. Mr. Gomez-Borja asserts that the disclosure of the Employer's key evidence only in the final report (the IR), with a 14-day response window, created an imbalance, as the Employer had earlier access to the Complainants' submissions.
24. The Determination indicates that the Employer provided their submissions as part of the investigation process, and these were disclosed to the Complainants in accordance with standard procedures. The 14-day response window is consistent with timelines established in similar cases. While Mr. Gomez-Borja argues this was insufficient, no evidence has been presented showing how the time afforded failed to allow the Complainants to respond meaningfully. The principle of fairness does not guarantee extended time beyond what is reasonable under the circumstances. Having reviewed the record, I find that in this case, whenever an extension of time was requested by the Complainant's representative to respond, the Investigator provided an extension. Mr. Gomez-Borja has not established any procedural unfairness.

### **(ii) Dismissal of Evidence**

25. Mr. Gomez-Borja alleges the Delegate dismissed or disregarded key evidence, including video footage and the Employer's admissions, while accepting unsubstantiated assertions by the Employer.
26. The Determination reflects that the Delegate reviewed all evidence, including the video footage, and made findings based on its probative value. The decision not to accept the Complainants' interpretation of the footage or their emphasis on certain admissions does not, on its own, amount to a breach of natural justice. The weight assigned to evidence is a matter of a delegate's discretion, provided it is exercised fairly. I do not find the Delegate to have unfairly exercised her discretion here.

### **(iii) Bias and Hostility**

27. Mr. Gomez-Borja contends that the Investigator exhibited "direct hostility" toward the Complainants' representative, Raul Gatica, allegedly causing "health-related issues" that necessitated Mr. Gatica's withdrawal and the reassignment of the matter to another representative, Mr. Andres Caicedo. Mr. Gomez-Borja further alleges that procedural fairness was compromised when the Investigator declined a request for a video call to address and clarify outstanding issues.
28. I find Mr. Gomez-Borja's allegation, as advanced by his representative, Mr. Caicedo, that the Investigator demonstrated "direct hostility" toward Mr. Gatica, to be particularly troubling, especially given the absence of any objective evidence to support this claim.
29. I have reviewed the record and find that the written exchanges from the Investigator to Mr. Gatica are consistently professional, respectful, and devoid of hostility. Unfortunately, I cannot say the same about Mr. Gatica's communications to the Investigator. The record includes several examples of Mr. Gatica's exchanges, such as the following:

### ***Response of Mr. Gatica on behalf of Mr. Gomez-Borja to the IR dated May 8, 2024***

- “...you were hiding information from the employer to us, which makes the process of investigation unfair and shows a possible bias in favor of the employer, or intentional negligence during the investigation process.”
- “...It is really insulting that you said that we didn’t mention to you how much time Salvador spent taking care of the dog. If you intentionally wanted to erase that information (sic) is a different story....”
- “The ESB officer tried to disguise his bias by giving his opinion when he said: ‘It is unclear how this argument relates to wage misrepresentation as the minimum wage rate was agreed to by all parties before the start of employment.’”
- “...it is clear that the ESB officer has no idea how the Temporary Foreign Workers Programs works (sic)....”
- “If something is unclear, is it the responsibility of the ESB officer to ask the worker to clarify that, or provide more information about anything[?] It is totally negligent to not do that. Even more, it is really debauched that the ESB negligence charges the responsibility to the worker.”
- “The question is why the [Investigator] didn’t request more information? Was it a deficiency or was it a way to hide his bias in favor of the employer?”
- [The Investigator’s] attitude shows at least a lack of interest in getting all the information and clarifications related to the case.”
- “...the ESB officer is trying to manipulate what we said.”
- “[The Investigator] lies totally when he affirms in his report that: ‘Mr. Gill submitted information by way of a package of documents to support his assertion that the Complainants were in fact working as farm workers.’”
- “There is really an impartial position of the ESB officer... his report is biased in favour of the employer or at least he did a deficient investigation that must be carefully reviewed by the decision maker....”
- “... the ESB officer is showing all his bias in favor of the employer, it’s a bad precedent that an ESB officer tries in all ways to show that the employer is telling the truth.”
- “... was it laziness to review the employer ‘evidence’ or was it already an ESB officer bias?”

<sup>30.</sup> Having reviewed the entire record, including the above excerpts in their full context, I find Mr. Gatica’s correspondence to be deeply disrespectful to the dignity of the Investigator. These statements not only challenge the Investigator’s impartiality without any objective basis but also contain *ad hominem* attacks that are discourteous and inappropriate. The tone and content of these communications undermine the professionalism expected in such exchanges and fail to contribute constructively to the investigation process.

<sup>31.</sup> The Tribunal has consistently and unequivocally stated that an allegation of bias must be supported by evidence. As noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98), the test for determining bias, whether actual bias or a

reasonable apprehension of bias, is an objective one, and the evidence presented must allow for objective findings of fact. Furthermore:

. . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

32. An allegation of bias cannot be made speculatively. The onus of demonstrating bias or a reasonable apprehension of bias lies with the person alleging its existence—in this case, Mr. Gomez-Borja or his representative in the appeal, Mr. Caicedo. I find that neither has provided any evidence that would demonstrate, to an objective observer, that either the Investigator or the Delegate in this case acted in a biased manner as defined by the applicable standard.
33. Regarding the declined video call with the Complainants during the investigation, this decision fell within the Investigator’s discretion and does not, on its own, demonstrate bias or a lack of neutrality, particularly since the Complainants had other opportunities to present and clarify their case. I also find the Investigator’s response to Mr. Gomez-Borja’s former representative, Mr. Gatica, on this matter to be persuasive. The Investigator explained that, as an investigator rather than a decision-maker, he could not “zoom call the complainants and agree or disagree” with Mr. Gatica as to whether the Complainants are the same individuals as in the videos they presented in the investigation, as that would be engaging in a fact-finding exercise on behalf of a party.

#### **(iv) Bias in Witness Testimony Collection**

34. Mr. Gomez-Borja alleges a breach of natural justice on the basis that the Investigator did not prioritize obtaining testimony or evidence from the Mexican Consulate. He contends that the Mexican Consulate’s actions in transferring the Complainants to another farm demonstrates recognition of a breach of contract or abuse by the Employer. He also argues that failing to contact the Consulate and include its evidence in the investigation represents procedural unfairness and bias against the Complainants.
35. I find that the Delegate directly addressed the argument regarding the Mexican Consulate’s role in the Determination. While acknowledging that the evidence presented to the Mexican Consulate may have been compelling enough to justify the transfer of the Complainants, the Delegate highlighted the one-sided nature of this evidence. The Consulate’s decision was based solely on information provided by the Complainants without input from the Employer or any corroborative inquiry. The Delegate reasoned that the Consulate’s decision, while potentially persuasive, could not be deemed definitive evidence of a breach of contract.
36. In keeping with principles of fairness and natural justice, I find the Delegate carefully considered both parties’ evidence. The Delegate concluded that the broader evidentiary record—including testimony from the Employer and its witnesses—did not clearly establish the Complainants’ claims of abuse or breach. This balanced approach, I find, demonstrated the Delegate’s commitment to impartial adjudication and ensured that all relevant evidence was evaluated fairly.



37. I also note that the Investigator's correspondence with Mr. Gatica, dated May 31, 2024, further demonstrates impartiality and fairness. The Investigator explained that they could not contact potential witnesses, such as the Mexican Consulate, without clear relevance or specific information being provided.

38. Overall, I find that the Complainants were given the opportunity to present evidence and explain its relevance. The Investigator's decision not to independently seek further evidence from the Mexican Consulate does not constitute a denial of natural justice. Rather, it reflects the Investigator's adherence to their neutral role and the lack of specific guidance or substantiation from the Complainants.

#### **(v) Flaws in the ESDC Investigation**

39. In the second written appeal submissions dated September 25, 2024, Mr. Gomez-Borja further argues that the ESDC investigation was inadequate and procedurally unfair. He contends that the investigation, conducted after the Complainants' employment had ended, failed to accurately reflect their actual work experiences, resulting in a one-sided assessment reliant solely on the Employer's evidence. Mr. Gomez-Borja raises two main concerns: first, the omission of the Employer's admission that the Complainants worked on house construction, which he alleges was contrary to the terms of the Labour Market Impact Assessment (**LMIA**); and second, the absence of any consequences for the Employer's late and incomplete submission of documents, which he argues demonstrates bias in the investigation.

40. In the Determination, the Delegate acknowledged the limitations of the ESDC investigation, including its reliance on the Employer's evidence and the absence of input from the Complainants. However, the Delegate noted that ESDC investigations are retroactive by design and may assess compliance over several years, including the period of the Complainants' employment. While the ESDC report formed part of the evidence before the Delegate, I find it was not determinative of the issues. Instead, the Delegate undertook an independent assessment of all the evidence presented by both parties and did not find evidence of a broader violation of LMIA conditions. I find that the Delegate's approach was balanced, carefully weighing the ESDC report alongside the other evidence, without unfair reliance on the ESDC investigation's findings, thereby ensuring procedural fairness.

#### **(vi) Illegal deductions**

41. Mr. Gomez-Borja raises for the first time, in his appeal submissions, the argument that the Employer made "illegal deductions" from the Complainants' wages without their written consent, contrary to the *ESA*. Specifically, Mr. Gomez-Borja relies on the Employer's statement provided to the Investigator during the investigation, in which the Employer acknowledged deducting \$300 from each Complainant's paycheque for cash advanced for groceries. Mr. Gomez-Borja asserts that the Employer did not secure a written assignment agreement as required by the *ESA* [s. 22(4)(a)] and claims this issue was overlooked by the Investigator.

42. The Tribunal's jurisprudence establishes that appeals should not serve as an opportunity to introduce new issues or evidence that could have been raised during the investigation of a complaint. In *Kaiser Stables Ltd.*, BC EST # D058/97, and *Tri-West Tractor Ltd.*, 1996 CanLII 20965

(BC EST), the Tribunal held that while parties may address issues arising directly from the determination or submit evidence unavailable during the investigation, they cannot advance arguments based on evidence already known at that stage. Additionally, in *Davies et al.*, BC EST # D171/03, the Tribunal adopted a four-part test for admitting new evidence on appeal: (a) the evidence could not, with the exercise of due diligence, have been discovered and presented earlier; (b) it is relevant to a material issue; (c) it is credible; and (d) it has high probative value. These criteria are conjunctive, meaning all four must be satisfied for the evidence to be considered.

43. In this case, the evidence concerning the deductions was known during the investigation. On August 17, 2023, the Investigator informed the Complainants' representative, Mr. Gatica, by email, of the Employer's explanation that paycheques had been reissued with \$300 deductions for cash advances made to the Complainants for groceries. Despite being aware of this information, the Complainants did not raise the issue during the investigation. Furthermore, no explanation has been provided for their failure to address the matter at that stage. As such, this argument does not satisfy the first prong of the *Davies et al.* test, which requires that the evidence could not have been discovered and presented earlier with due diligence.

44. Natural justice requires that parties are given a fair opportunity to present their case and respond to the case against them. Here, the Complainants were aware of the Employer's explanation during the investigation and had the opportunity to raise the issue of deductions at that time. The Investigator is not obligated to independently pursue every potential violation of the *ESA* without the parties bringing it to their attention. Accordingly, I find no procedural unfairness or breach of natural justice in this instance.

#### **(vii) Vacation**

45. As with the argument concerning "illegal deductions," Mr. Gomez-Borja, for the first time on appeal, argues that the Employer violated the *ESA* by paying vacation pay directly to the Complainants without a written agreement (see s. 58(2)(b)). He claims this practice contravenes the *ESA*'s requirement for a written agreement to pay vacation pay on scheduled paydays and contends that the Investigator failed to inquire into this issue, thereby overlooking a significant violation by the Employer.

46. However, the Complainants were aware of the vacation pay practices and had the opportunity to raise concerns during the investigation. As indicated previously, while natural justice ensures a fair chance to present one's case, the Investigator is not obligated to identify every potential *ESA* violation, especially when the evidence was available to the Complainants. Allowing Mr. Gomez-Borja to make new arguments in the appeal based on evidence that was available during the investigation would undermine the fair and efficient resolution of disputes, as outlined in section 2(d) of the *ESA*.

#### **CONCLUSION**

47. I find that Mr. Gomez-Borja's appeal fails to demonstrate any substantive errors in the application of the law or breaches of natural justice that would warrant overturning the Determination. Accordingly, I conclude that the appeal has no reasonable prospect of success and dismiss it on this basis.

**ORDER**

48. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal. Pursuant to section 115(1)(a), I confirm the Determination.

*/S/ Shafik Bhalloo*

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**Shafik Bhalloo, K.C.**  
**Member**  
**Employment Standards Tribunal**