Employment Standards TRIBUNAL

Citation: Bilga Farms Ltd. (Re)
2018 BCEST 53

An appeal

- by -

Bilga Farms Ltd.
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/36

DATE OF DECISION: May 15, 2018

DECISION

SUBMISSIONS

Manraj Kandola — on behalf of Bilga Farms Ltd.

INTRODUCTION

1. This is an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") and it concerns the issuance of a section 98 $500 monetary penalty against Bilga Farms Ltd. (the "Appellant"). The penalty was levied by way of a Determination (the "Determination") issued on February 28, 2018, by Rachael Larson, a delegate of the Director of Employment Standards (the "delegate"). The delegate also issued separate "Reasons for the Determination" (the "delegate's reasons") concurrent with the Determination.

2. The penalty was levied because the Appellant failed to comply with its record-keeping obligations as set out in section 28 of the *ESA* (I have *italicized* the key subsections for purpose of this appeal):

> 28 (1) *For each employee, an employer must keep records of the following information*:
>
> (a) the employee's name, date of birth, occupation, telephone number and residential address;
>
> (b) the date employment began;
>
> (c) *the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;*
>
> (d) *the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;*
>
> (e) the benefits paid to the employee by the employer;
>
> (f) the employee's gross and net wages for each pay period;
>
> (g) each deduction made from the employee's wages and the reason for it;
>
> (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
>
> (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
>
> (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
>
> (2) Payroll records must
>
> (a) *be in English,*
>
> (b) be kept at the employer's principal place of business in British Columbia, and
>
> (c) be retained by the employer for 2 years after the employment terminates.

BACKGROUND FACTS

3. On July 11, 2017, several officers from the Employment Standards Branch attended at the Appellant's farm in Kelowna for purposes of conducting a workplace audit regarding compliance with the *ESA*. During the course of the compliance audit, some workers indicated that they were not being paid in accordance with the provisions of the *ESA*.

4. By letter dated July 12, 2018, the Director of Employment Standards issued a demand for production of payroll records to the Appellant regarding certain named individuals for the period May 1 to July 15, 2017 (see sections 85 of the *ESA* and 46 of the *Employment Standards Regulation*). The records were to be delivered on or before July 26, 2017, to the Employment Standards Branch's Langley office.

5. On July 19, 2017, and by way of response to the demand, the Appellant delivered 14 pages of records to the Langley office. The records indicated that the individuals in question were paid both a piece rate value and an hourly rate. On January 15, 2018, the Appellant delivered further records (daily time sheets); these records were incomplete in that all requisite information was not included in the records (for example, actual hours of work not listed). On January 29, 2018, the Appellant delivered another set of records.

6. As recounted in the delegate's reasons, on February 5, 2018, the Appellant informed the Employment Standards Branch "that it does not keep records of hours worked when paying by piece rate".

7. In her reasons, the delegate noted that "Section 28 of the Act specifies…an employer is required to keep a record of all hours worked by each employee on each date, regardless of whether the employee is paid on an hourly, piece rate, or other incentive basis". The delegate then concluded:

> [The Appellant] admitted to not keeping records of actual hours worked by its…employees when the employees worked for a piece rate. The Employer's time sheets clearly show that when the employees worked for a piece rate, their hours of work were not recorded.
>
> Accordingly, I find [the Appellant] has contravened section 28 of the Act by failing to keep records of hours worked by the five employees interviewed by the Team on July 11, 2017. I impose a mandatory administrative penalty in the amount of $500.00 with a contravention date of July 1, 2017, the last date on [the Appellant's] employee time sheets which show piece rate work was performed but no hours of work were recorded.

REASONS FOR APPEAL

8. This appeal is based solely on subsection 112(1)(c) of the *ESA*: "evidence has become available that was not available at the time the determination was being made".

9. The Appellant's argument supporting this ground of appeal is as follows:

> The hours were not recorded on the time sheets as those are submitted to accountant and did not want to cause confusion between hours and peace rate. My parents have returned from their winter vacation and mom said she keeps all hours in her records along with peace rate per day in her time book. She writes names in Punjabi and I have translated into English. I will submit those records

along with the appeal form. We will also rectify the issue by making sure we include hours on the time sheet as well by an "in & out" in a column. [*sic*]

I hope you reconsider the decision…

[*Note*: subsection 28(2)(a) mandates that payroll records be kept in English]

FINDINGS AND ANALYSIS

10. "New evidence", as contemplated by subsection 112(1)(c) of the *ESA*, will be accepted in accordance with the framework set out in *Davies et al.*, BC EST # D171/03. In particular, the "new evidence" will not be accepted unless the evidence:

- could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- is relevant to a material issue arising from the complaint;
- is credible in the sense that it is reasonably capable of belief; and
- has high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

11. In this case there is, in fact, no "new evidence" within the *Davies* framework. In effect, the Appellant has created new documents and seeks to have those documents received retroactively in an effort to avoid liability for a $500 monetary penalty. The Appellant maintains that it will, henceforth, comply with its record-keeping obligations under the *ESA*, and I am prepared to accept that declaration at face value. However, that declaration does not speak to the correctness of the Determination. The simple facts are that a valid demand for production of payroll records was issued and, after reviewing the records that were submitted, the delegate determined (correctly, in my view) that the records did not comply with section 28 of the *ESA*; indeed, the Appellant concedes much. In consequence, a $500 monetary penalty was issued.

12. The delegate issued a valid demand for the production of payroll records. The Appellant responded by providing records that did not comply with the relevant provisions of the *ESA* (especially, section 28) and, further, conceded that it had never complied with the provisions of the *ESA* regarding its statutory record-keeping obligations. A $500 penalty was mandated in these circumstances. Quite simply, there is no merit whatsoever to this appeal and, as such, it must be dismissed as having no reasonable prospect of succeeding.

13. This appeal may have been predicated on a concern about the escalating nature of monetary penalties under the *ESA*'s penalty regime. A second similar contravention would result in a $2,500 penalty and a third in a $10,000 penalty. But this escalation only applies to later contraventions within three years of the first contravention (see section 29 of the *Employment Standards Regulation*).

ORDER

14. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed and pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal