

Citation: All Seasons Mushrooms Inc. (Re)
2018 BCEST 97

An appeal

- by -

All Seasons Mushrooms Inc.
("All Seasons")

- 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: David B. Stevenson

FILE NO.: 2018A/51

DATE OF DECISION: September 26, 2018

THE FACTS

10. All Seasons operates a mushroom farm in Abbotsford, BC.
11. On May 16, 2017, the Employment Standards Branch Agricultural Compliance Team (the “Team”) conducted a site inspection at an All Seasons mushroom farm location.
12. At the time of the worksite inspection, the prevailing minimum piece rate for mushrooms, as fixed in section 18(1) of the *Regulation*, was \$0.249 a pound.
13. The Team conducted interviews with the Employees and one other person, obtaining information about their work and work rate.
14. Three of the Employees worked piece rate as mushroom harvesters; one of the Employees worked hourly as Harvest Service.
15. The Director issued a Demand for Employer Records (the “Demand”) for the employees interviewed on June 22, 2017, seeking records for the Employees for a period from May 1, 2017, to May 31, 2017 (the “review period”).
16. All Seasons responded to the Demand. The records provided generated discussions between the Director and representatives of All Seasons and the production of additional records and explanations on those records.
17. One area of discussion was how the piece rate mushroom harvesters were paid. Documents were provided by All Seasons on that matter accompanied by a letter from Susan McBride (“Ms. McBride”), director of human resources for Highline Mushrooms, a parent company for All Seasons, containing the following:

Section 18(1) of the Employment Standards Regulation requires that employees be paid \$0.260 per pound of mushrooms picked, based on “the gross volume or weight picked”.

*Section 18(4)(d) requires employers to keep records of “(d) the volume or weight picked in **each day by each worker.**”*

Our piece rates pay rates per lb based on type of mushroom, some of which are slightly under the minimum rate (i.e. \$0.2392/lb per 10 pound GFS box of Crimini Medium) and some of which are substantially over (i.e. \$0.416/lb per 5 pound box of Crimini Jumbo, paid as 5.5 pounds for work to destem). The base price is before vacation pay or other bonuses, such as container and section bonuses.

The result of this is that workers are paid above the minimum wage requirement of \$0.260 per pound of mushrooms picked based on weight picked on each day worked. If a worker were to end up picking only lesser value mushrooms in a day such that the variable piece rates resulted in less than the minimum wage, All Seasons grosses up the wage to minimum wage.
18. The above excerpt describes how the piece rate for the mushroom harvesters was calculated, which was based on the picking rates applied by All Seasons for various grades of mushroom, many of which were

above the minimum piece rate prescribed in the *ESA*, averaged over a day, and what is referred to by All Seasons as the “Gross Up Practice”.

19. At the request of the Director, All Seasons provided additional documents and further explanation.
20. The Director found the piece rate assigned to some of the mushroom varieties picked by the mushroom harvesters were lower than the prevailing piece rate in the *Regulation* and found a contravention of section 18(1) of the *Regulation*.
21. The Director also found All Seasons had contravened section 17 of the *ESA* by failing to pay the hourly Employee all wages owing. There is no appeal on this finding.
22. The Director found a contravention of section 27 of the *ESA*. There is no appeal on this finding.

ARGUMENT

23. All Seasons submits the Director erred in law in finding they contravened section 18(1) of the *Regulation*.
24. All Seasons submits the Director’s error arises from a misinterpretation and misapplication of the relevant statutory provisions in finding a contravention of section 18(1) of the *Regulation* when none of the piece rate Employees were paid less than the statutory minimum piece rate during the review period.
25. All Seasons submits the minimum wage requirements are met if, at the end of a working day, the piece rate Employees’ pay, which is calculated on the weighted average of the total pounds of each grade of mushroom harvested and the posted rates for the corresponding grades of mushrooms, either exceeds the legislated minimum wage or is “grossed up” to minimum wage.
26. All Seasons says the Director erred by failing to give effect to the word “gross” in section 18(1). All Seasons submits “gross” should be read as contemplating “the harvesting of mushrooms, and that in *total* (or in *gross*), the total wage paid divided by the total (or “gross”) weight of mushrooms picked must be at least the minimum *dollars per gross weight of mushroom picked* set out therein.”
27. All Seasons argues this reading of subsection 18(1) should be informed by section 18(4), which requires records to be kept by a farm labour contractor that includes “the volume or weight picked in each day by each worker”.
28. Delegate Ullrich’s submission contains the following points:
 - i. All Seasons is not a “farm labour contractor” as defined in the *Regulation* and section 18(4) is not applicable;
 - ii. In section 18(1), the Director interprets the word “gross” modifying the phrase “volume or weight picked” to mean *as harvested* – the “volume or weight” before cleaning, trimming, and sorting;

- iii. It is acceptable for All Seasons to assign higher than minimum piece rates to some grades of mushroom, but it is not acceptable to assign a piece rate for lower grade mushrooms that is below the minimum piece rate;
- iv. There was no evidence that All Seasons applied an “averaging” calculation as described by it.

29. In its final reply, All Seasons repeats its position that the piece rate assigned to certain grades of mushrooms was not the piece rate that was actually paid once the weighted average calculation, or if necessary, the Gross Up Practice, was applied.

30. All Seasons submits the Director’s argument incorrectly conflates what might be assigned with what was paid, incorrectly asserting both are required by the *ESA*, while the legislation does not contain a requirement about the assignment of rates. The argument discounts the effect of section 18(2), noting that All Seasons was not found to have contravened that provision.

31. All Seasons says that whether it is a “farm labour contractor” does not detract from the value of section 18(4) in interpreting section 18(1).

ANALYSIS

32. 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.*

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

34. Error of law is alleged. 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 (B.C.C.A.):

- 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.

35. In this case, All Seasons argues the Director misinterpreted and misapplied a provision of the *ESA* and acted on a view of the facts that could not reasonable be entertained.
36. Both of the errors alleged address the same question: whether the Director erred in finding All Seasons contravened section 18(1) of the *Regulation* in the manner it paid the piece rate Employees.
37. The answer to the question depends on whether the method by which All Seasons paid the piece rate Employees – determining the piece rate on a weighting of all grades of mushrooms harvested by each of the Employees in a day, and “grossing up” if required – satisfies the requirements of section 18(1) of the *Regulation* to pay the piece rate Employees the prevailing minimum rate for the gross volume or weight picked.
38. While the Determination and the submissions from the parties have comprehensively expressed their respective arguments, the question boils down to no more than this: does the *ESA* allow the minimum wage for farm workers employed on a piece work basis to be calculated on a daily basis?
39. In my view, it does not.
40. As a matter of law, the *ESA* identifies wages in the context of work performed by an employee. The Tribunal has stated, and restated, on many occasions that the *ESA* says wages are earned when work is performed and are payable when they are earned: see for example *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST # D376/96.
41. The minimum wage provision for farm workers employed on a piece work basis is very direct; it is a minimum wage based on a unit of volume or weight picked, which is expressed in the *Regulation* as bins/cubic meters, pounds/kilograms, or a bunch.
42. A unit represents the performance of work for which the worker is entitled to a wage.
43. A farm worker employed on a piece rate is entitled to the minimum wage for each unit completed.
44. In the circumstances of this case, at the relevant time, the *Regulation* provided a minimum wage for the piece rate Employees based on “a pound”; in other words, each pound of mushrooms harvested represented a unit of work and entitled the piece rate Employee to at least minimum wage for that unit of work.
45. I find the interpretation and application by the Director of the minimum wage requirements in this case, which is expressed in the first full paragraph on page R9 of the Determination, is correct. Such interpretation and application meets the statutory purposes of ensuring basic standards of employment and of fairness. As the Tribunal stated in *Orca Security Corporation*, BC EST # D003/09:
...A fundamental objective of the *Act* is that employees receive the wages which they have earned for the work they have performed.
46. To view this case in any other way allows All Seasons to cheat its piece rate workers of the promise of a higher piece rate for harvesting some grades of mushrooms, as a daily “averaging” of all piece rates

logically requires the higher piece rate be reduced at the expense of ensuring the sub-minimum wage piece rate meets the statutory threshold.

47. It also effectively undermines section 18(2) which requires an employer of farm workers employed on a piece work basis to display the volume of each picking container, the volume or weight required to fill each picking container, and the resulting piece rate. The objective of that provision is not achieved if the “resulting piece rate” is uncertain because it can be affected by some undefined “averaging” calculation.
48. It also puts a fiction to the contention by All Seasons of a “Grade List” setting out the piece rates for each grade of mushroom to which workers had access, as I am doubtful that any such list included information that told a piece work employee the higher posted rates could be adjusted downward to allow an “averaging”, or upward adjustment, of other piece rates, in order to meet All Seasons’ minimum wage obligations.
49. While All Seasons says no contravention of section 18(2) was found, that does not prevent considering that provision to test the correctness of the Director’s approach to section 18(1) of the *Regulation*.
50. I find section 18(4) does not assist All Seasons’ arguments. That provision deals with record keeping for farm labour contractors and does not apply to All Seasons, whose obligations are found in Part 3 of the *ESA*. That provision does not relate to minimum wage entitlement.
51. For the above reasons, I dismiss the appeal.

ORDER

52. Pursuant to section 115 of the *ESA*, I order the Determination dated April 12, 2018, be confirmed in the amount of \$1,708.74, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal