

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Shoker Farms Ltd.
("Shoker")

- 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)

PANEL: Maia Tsurumi

FILE No.: 2020/092

DATE OF DECISION: August 27, 2020

DECISION

SUBMISSIONS

Baljinder Shoker

on behalf of Shoker Farms Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Shoker Farms Ltd. (“Shoker”) has filed an appeal of a determination (the “*Determination*”) issued by Cory T. LaBoucane (the “*Delegate*”), a delegate of the Director of Employment Standards, on June 17, 2020. The Delegate found that Shoker contravened sections 18 and 58 of the *ESA* and sub-section 46(1) of the *Employment Standards Regulation* (the “*Regulation*”). In the result, Shoker was ordered to cease contravening the *ESA*, to pay \$1,940.67 to Bharpur Thind (the “*Complainant*”), and to pay \$1,000.00 in administrative penalties.
2. Shoker appeals the *Determination* on the grounds that evidence has become available that was not available at the time the *Determination* was being made.
3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
4. This decision is based on the submissions made by Shoker in its Appeal Form, the sub-section 112(5) record (the “*Record*”), the *Determination*, and the Reasons for the *Determination* (the “*Reasons*”).

ISSUE

5. The issue before the Employment Standards Tribunal is whether all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

THE DETERMINATION

Background

6. Shoker is a company incorporated in British Columbia. It operates a farming operation in Chilliwack, British Columbia. Its listed directors are: Ajit Singh Shoker (“Mr. Ajit Shoker”); Baljinder Shoker (“Mr. Bobby Shoker”); Malkiat Shoker; and Manjit Shoker. Mr. Manjit Shoker and Mr. Ajit Shoker are its listed officers.
7. The Complainant was employed as a farm worker at Shoker and filed a complaint (the “Complaint”) on September 9, 2019.

Issues Before the Delegate

8. The issue before the Delegate was whether the Complainant was entitled to regular wages.

Evidence and Submissions

9. The Complaint said the Complainant was employed by Shoker as a farm worker from June 6 – 18, 2019, and that he was to be paid an hourly rate. However, the Complaint did not provide a wage rate. The Complaint stated that the Complainant was scheduled to work 12 hours per day, 7 days per week, and he worked a total of 130 hours during his employment for which he was owed \$1,794.00. The Complainant resigned from his work with Shoker on June 18, 2019.
10. The Delegate explained, and the Record indicates, that he tried unsuccessfully to contact the Complainant several times between January 30 and February 3, 2020. On February 3, 2020, the Delegate sent a letter via registered mail to the Complainant, which asked him to contact the Employment Standards Branch (the “Branch”) by February 24, 2020. Canada Post confirmed that this letter was delivered to the Complainant on February 7, 2020. However, by June 17, 2020, when the Determination was made, the Complainant had not yet contacted the Delegate.
11. On February 25, 2020, the Delegate spoke with Mr. Bobby Shoker by telephone. Mr. Bobby Shoker said he did not recall the Complainant and did not have access to employee records for Shoker. He indicated that the person who had access to these records was in India. Mr. Bobby Shoker agreed to participate in a telephone fact-finding interview with the Delegate on March 3, 2020, and indicated he would try to locate the Complainant’s employee records.
12. On March 2, 2020, Mr. Bobby Shoker e-mailed the Delegate and asked him if the interview could be postponed until March 24 or 25, 2020. He told the Delegate he was still trying to track down records for June 6 – 18, 2019, and that the only person who would know if there were any records for the Complainant was out of the country until March 23, 2020. Mr. Bobby Shoker said he should have some information for the Delegate by March 24 or 25, 2020. The Delegate agreed to reschedule the fact-finding interview to March 24, 2020, and asked Mr. Bobby Shoker to provide the Complainant’s employment records prior to the interview. The Delegate asked for the full name and contact information for the person who would have information about the location of the records. Mr. Bobby Shoker did not respond to either request.

13. On March 24, 2020, the Delegate interviewed Mr. Bobby Shoker. Mr. Bobby Shoker said he was unable to access the employment records because Mr. Ajit Shoker (who is Mr. Bobby Shoker's father) was the only person who could provide that information and he was still in India. Mr. Bobby Shoker said he could not help any further with the investigation and that the Delegate would have to wait until Mr. Ajit Shoker returned from India.
14. On March 25, 2020, the Delegate issued a Demand for Records (the "Demand") to Shoker under subsection 85(1)(f) of the *ESA*, which required Shoker to deliver payroll records for the Complainant to the Branch by April 3, 2020. The Record indicates the Demand was delivered via registered mail to Shoker on March 27, 2020. Shoker never provided any payroll records to the Branch.

Delegate's Findings and Analysis

Regular wages

15. The Delegate explained that if an investigation is conducted, the Director must make reasonable efforts to contact the parties under investigation: *ESA*, section 77. The Delegate stated that he gave the Complainant an opportunity to provide information relating to his Complaint, but he never heard back from him. The Delegate also stated that he gave Shoker more than one opportunity to provide information relating to the Complainant's employment, but he never received any payroll records or evidence that the Complainant's wages were paid.
16. In these circumstances, the Delegate found the evidence in the Complaint was the best evidence available to him.
17. The Complaint stated that the Complainant was scheduled to work 12 hours per day, 7 days per week from June 6 – 18, 2019, which was a 13-day period. However, the Delegate noted that the Complaint stated that the Complainant worked 130 hours for Shoker. Therefore, he concluded that taking into account the likelihood that the Complainant took breaks during his schedule hours of work, the Complainant likely worked 10 hours each day.
18. The Complaint said the Complainant was owed \$1,794.00 in regular wages, but was silent on the rate of pay. The Delegate found the rate of pay must have been the hourly minimum wage in accordance with section 16 of the *ESA*, which was \$13.85 during the Complainant's employment with Shoker. The Delegate concluded the Complainant was owed \$1,800.50 in regular wages (130 hours at \$13.85 per hour). Under section 58 of the *ESA*, the Complainant was also entitled to vacation pay of 4%, which on wages of \$1,800.50 was \$72.02. There was an additional amount of \$68.15 in interest owed to the Complainant under section 88 of the *ESA*.
19. Based on the above, the total amount owing to the Complainant was \$1,940.67. Section 18 of the *ESA* requires an employer to pay all wages owing to an employee within six days after the employee terminates employment. As the Complainant quit his employment on June 18, 2019, Shoker was required to pay all outstanding wages to him by June 24, 2019, and its failure to do so was a contravention of section 18.

Penalties

20. Sub-section 29(1) of the *Regulation* imposes a mandatory administrative penalty on a person who the Director finds has contravened a provision of the *ESA* or the *Regulation*.
21. Shoker's contravention of section 18 of the *ESA* for failing to pay all wages owing to an employee within six days after the employee terminates the employment was subject to a mandatory \$500.00 administrative penalty.
22. The Delegate also imposed an administrative penalty of \$500.00 for Shoker's violation of sub-section 46(1) of the *Regulation*. Sub-section 46(1) says a person who is required under sub-section 85(1)(f) of the *ESA* to produce or deliver records to the Director must do so as and when required. Shoker failed to provide payroll records as required by the Demand and so violated sub-section 46(1).

ARGUMENT

23. Shoker submits that it only owes the Complainant for 68.25 hours worked at a rate of \$13.85 per hour, plus 4% vacation pay. This amounts to \$983.07 owed by Shoker to the Complainant for regular wages. It is unclear if Shoker is also submitting that an amount for "Rent" should be deducted from this amount. If this is the case, then Shoker says it owes the Complainant \$733.07.
24. In its Appeal Form, Shoker submitted what it called "new information" in relation to the Determination. This information was a photograph of a timesheet (the "Timesheet"). At the top of the page, on the line for "WORKER", the Complainant's name is noted in blue pen. Next to this on the line for "MONTH", the date "June 2019" is written, also in blue pen. Underneath, the word "RAIN" in black pen or pencil is written next to the space for entries for the 6th and 7th of June. The entries for the dates "8" through to "18" are in black pen or pencil and have start and finish times, lunch breaks, total hours worked, and the type of work done. Below this information is the statement:
- Left Without Notice
June- 18- afternoon
address unknown
25. At the bottom right of the Timesheet are Shoker's calculations for 68.25 hours at \$13.85 per hour, plus 4% vacation pay and the deduction of \$250 for rent. A line in blue pen is drawn around these calculations and in the same blue pen is the date "06-17-2020".
26. Mr. Bobby Shoker, on behalf of Shoker, submits that he told the Delegate on March 24, 2020, that he had no access to information as to whether there was a timesheet for the Complainant. Mr. Bobby Shoker states that information for that division of Shoker is held by Mr. Ajit Shoker and Mr. Ajit Shoker was the only one who had access to them, if they existed.
27. Shoker further submits that he told the Delegate on March 24, 2020 that Mr. Ajit Shoker was in India and unable to return to Canada until the travel restrictions were lifted, and on March 24, 2020, Mr. Bobby Shoker assumed Mr. Ajit Shoker's return to Canada would be April 15, 2020, which was the date planned for his return.

28. Mr. Bobby Shoker says that after further searching of Mr. Ajit Shoker's residence, he now has the Complainant's work record for the relevant period. Mr. Bobby Shoker states that the calculations on the lower right of the Timesheet were made by him and were initialed by him on June 17, 2020.
29. Shoker also appears to submit that it should not be penalized for failing to produce records required by the Demand because the Demand was sent to Shoker's corporate offices, which are also Mr. Ajit Shoker's residence, and therefore Shoker's other directors were not aware of the Demand.

ANALYSIS

30. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
and
 - (c) evidence has become available that was not available at the time the determination was being made.

31. Below, I first consider Shoker's new evidence. Then, I address whether there was a breach of natural justice or an error of law.

New evidence

32. As described above, in support of its submission that it owes the Complainant less in wages than determined by the Delegate, Shoker submits the Timesheet, which purports to say the wages owing to the Complainant are \$983.07 (the question of a deduction for rent was not before the Delegate and is not relevant to this Appeal).
33. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

34. The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies sub-section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence... [The evidence] must meet four conditions:

- (a) 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;
- (b) the evidence must be relevant to a material issue arising from the complaint;

- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have 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:

Bruce Davies et al., BC EST # D171/03 at p. 3.

35. The Timesheet does not meet the Tribunal's test for admitting fresh evidence. With an exercise of due diligence, Shoker could have provided this evidence to the Delegate before the Determination was made.
36. Regardless of how Shoker has internally delegated responsibilities to its directors and officers, Shoker must keep employment records and these must be kept at its principal place of business in the province, presumably so they are available to be produced when required under the *ESA*. The Complainant's employment records should have been kept at Shoker's Bailey Road office or been otherwise accessible while Mr. Ajit Shoker was away.
37. Further, Shoker states that with further searching of Mr. Ajit Shoker's residence, Shoker has now found the Timesheet. Shoker provides no reason why this further searching could not have been done during the investigation and prior to the Delegate's Determination. This further searching is an exercise of due diligence that Shoker could have undertaken before the Determination was made.
38. Therefore, this ground of appeal has no reasonable prospect of success.

Breach of natural justice or error of law

39. I find the appeal also has no reasonable prospect of success in relation to a breach of natural justice or error of law in the Determination.
40. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them and have its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.
41. There is nothing in the Appeal Form, Record, Determination, or Reasons that indicates there was a breach of natural justice. Shoker knew the complaint against it, had an opportunity to reply to this complaint and had its case heard by an impartial decision-maker. Regarding the Demand itself, Shoker is a corporation and thus it was fair for the Delegate to send the Demand to its corporate offices. Furthermore, not only was Shoker aware of the investigation generally, the Record indicates that during the March 24, 2020 interview, the Delegate explained to Mr. Bobby Shoker that under the *ESA*, Shoker was required to produce payroll records and that the Delegate would be sending Shoker a demand for records with a deadline of April 3, 2020. The Delegate then e-mailed a copy of the Demand to Mr. Bobby Shoker on March 25, 2020, as well as sending the Demand via registered mail to Shoker's corporate offices.
42. Regarding a possible error of law, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in

the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

- (a) a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
- (b) a misapplication by the decision-maker of an applicable principle of general law;
- (c) where a decision-maker acts without any evidence;
- (d) where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
- (e) where the decision-maker is wrong in principle.

43. The Tribunal has adopted this definition: see e.g. *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

44. Shoker does not dispute that wages are owing and that it did not produce the records requested by the Delegate. It disputes the amount owing and also appears to dispute the finding of a violation of sub-section 46(1) of the *Regulation*.

45. Regarding the amount of wages owing, the Delegate was not wrong in principle and did not error in his interpretation or application of the *ESA* or in his application of an applicable principle of general law. Neither did the Delegate act without any evidence or act on a view of the facts that could not reasonably be entertained. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, *supra*, at p. 17.

46. The Delegate determined the amount owing to the Complainant based on the evidence in the Complaint. Shoker was given an opportunity to respond to this evidence but did not provide any evidence to contradict the Complainant's version of wages owed to him for the June 6 – 18, 2019 period. Shoker's Timesheet is not admissible evidence on appeal. The Delegate's conclusion based on the evidence before him was reasonable.

47. Regarding the failure to produce records in accordance with the Demand, Shoker was informed by phone, e-mail, and registered mail about the Demand and it failed to produce the Complainant's employment records, although it has belatedly tried to introduce some records on appeal. Also, Shoker did not attempt to contact the Delegate about the records before he issued his Determination, which was more than two months after the records were to be produced to the Branch. In light of this, the Delegate reasonably determined that Shoker had contravened sub-section 46(1) of the *Regulation*.

ORDER

48. Pursuant to sub-section 114(1)(f) of the *ESA*, I dismiss the appeal as having no reasonable prospect of success and pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated June 17, 2020, confirmed in the amount of \$2,940.67, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal