Employment Standards TRIBUNAL

Citation: Champ's Fresh Farms Inc. (Re)
2021 BCEST 103

An appeal

- by -

Champ's Fresh Farms Inc.
("Champ's")

– 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)

and

An application for suspension

- by –

Champ's Fresh Farms Inc.
("Champ's")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

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

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2021/073

DATE OF DECISION: December 21, 2021

DECISION

SUBMISSIONS

Christopher McHardy	legal counsel for Champ's Fresh Farms Inc.
Tara MacCarron	delegate of the Director of Employment Standards
Laurel Courtenay	legal counsel for the Director of Employment Standards

INTRODUCTION

1. This is an appeal by Champ's Fresh Farms Inc. ("Champ's) of a Determination issued by Tara MacCarron, a delegate of the Director of Employment Standards (the "delegate"). The Determination was issued on July 7, 2021, pursuant to section 79 of the *Employment Standards Act* (the "*ESA*"). By way of the Determination, which followed an investigation triggered by a confidential complaint, the delegate levied two separate $500 monetary penalties based on her findings that Champ's contravened section 27 of the *ESA* and section 18(1)(h) of the *Employment Standards Regulation* (the "*Regulation*").

2. As is discussed in greater detail, below, the delegate also issued several directions and orders including requiring Champ's to post $200,000 security, finalize what was termed a "self-audit", and make certain wage payments to its farm workers in accordance with the results of that self-audit. The self-audit completed in accordance with the delegate's directions which reflected her view about the proper interpretation and application of section 18(1)(h) – which Champ's disputes – resulted in a nearly $400,000 unpaid wage liability.

3. Champ's appeals the Determination on the sole ground that the delegate erred in law (see section 112(1)(a) of the *ESA*) regarding her interpretation and application of section 18(1)(h) of the *Regulation*.

4. Champ's also seeks a suspension of the Determination under section 113 of the *ESA*. As discussed in greater detail, below, the delegate ordered Champ's to post security, finalize a self-audit, and pay its employees all wages found to be owing as a result of the self-audit. These mandates were to be completed within certain specified time periods. Champ's has posted the security and completed the self-audit, but it asks for a suspension regarding the wage payment order. The Director of Employment Standards does not oppose the section 113 suspension application as it concerns the wage payment order, and also advised the Tribunal that she would not disburse any funds, or engage in any collection activities, pending the outcome of this appeal. Given this undertaking, the Tribunal's Registrar, on August 31, 2020, advised the parties that the Tribunal did not find it necessary to make a section 113 order at that time.

5. I am satisfied that the delegate erred in interpreting section 18(1)(h) of the *Regulation.* I am also satisfied that the delegate's position regarding who was required to be served with a copy of the Determination is incorrect. I first turn to this latter matter.

SERVICE OF THE DETERMINATION

6. The delegate's investigation followed the filing of a confidential complaint filed on March 11, 2021. The delegate, as set out at page R2 of her "Reasons for the Determination" accompanying the Determination (the "delegate's reasons"), "pursuant to section 76(2) of the Act…initiated an audit of all employees". This latter provision was repealed as of August 15, 2021, but the Director of Employment Standards still retains the power to conduct broader investigations to ensure compliance with the *ESA* (section 73.1, also effective August 15, 2021).

7. The Determination and the delegate's reasons were issued on July 7, 2021. In accordance with section 81 of the *ESA*, the Determination was served on Champ's (at its registered and records office), and on its three corporate directors. The Determination did not contain any indication that it was served on the confidential complainant or served on any of the farm workers who were entitled to unpaid wages under the delegate's wage payment order. However, the delegate later confirmed to the Tribunal that the Determination was served on the confidential complainant, but not on any of the approximately 300 employees who were awarded wages under the Determination.

8. Champ's appeal was filed on August 16, 2021. By letter dated August 31, 2021, the Tribunal's Registrar invited the delegate to file a submission regarding "whether the Director ought to have served the Determination on the approximately 300 employees affected by the Determination". The delegate filed a submission on September 9, 2021, following which both Champ's and the confidential complainant were invited to file reply submissions. Champ's filed a reply submission (on October 1, 2021), but the confidential complainant did not.

9. The delegate's position regarding service was that "firstly, the [*ESA*] does not require it and, secondly, it would be premature to do so." Champ's, for its part, simply adopted the delegate's submission on this matter, adding that "requiring service would unnecessarily delay and complicate proceedings".

10. Section 81(1) of the *ESA* states that a determination must be served on "any person named" in it. The delegate says: "As these individuals [i.e., the farm workers awarded wages under the Determination] have not been named, there is no requirement for the Director to serve them with a copy of the Determination." Since none of the 300 workers was actually identified by name in the Determination (nor was the confidential complainant, who actually was served), reading section 81(1) in a purely literal sense could lead one to conclude that none of the workers was required to be served. However, the delegate's position on this score ignores the Tribunal's decision in *Aquilini et al*., 2020 BCEST 90, where the Tribunal held that a person who is awarded wages under a determination is a person "named" for purposes of section 81(1), and thus has section 112 appeal rights, even if never formally served with the determination. *Aquilini* was an appeal decision, but neither the Director, nor any other party, applied to have it reconsidered under section 116 of the *ESA*.

11. *Aquilini*, although factually similar in many respects to this case, differs in that the 185 farm workers awarded wages in that proceeding (only 12 of whom, through their agent, formally filed unpaid wage complaints) were specifically identified in two appendices to the determination. None of these 185 farm workers was ever served with a copy of the Determination, although it was served on the agent who represented 12 of these workers. In this case, none of the 300 employees was similarly identified in an accompanying appendix and, as previously noted, none was ever served. In *Aquilini*, the Tribunal held, at

para. 211, that "*any person* who is awarded or denied wages under a determination, or whose rights, entitlements, or obligations are otherwise determined under the *ESA*, is a person 'named in a determination' within section 81" (*italics* in original text). Thus, whether a particular employee is formally identified in a determination, or served with a copy of it, is irrelevant to whether that person has section 112 appeal rights. As stated in *Aquilini* (at paras. 213 and 216):

> …complainants, as well as those employees whose claims are addressed in a determination, are "persons named" in the determination for purposes of section 81. Similarly, employers or other persons who were either specifically named in a complaint, or that were later identified during the course of an investigation (for example, as a "common employer"), and then held liable under a determination, are also "persons named" for purposes of section 81…
>
> I interpret section 112(1) to mean that any person "named" in a determination (in the sense that their rights, entitlements or obligations under the *ESA* were adjudicated under that determination), and who either was, *or should have been*, served with the determination, is a "person served with a determination" for purposes of section 112(1) of the *ESA*. (*italics* in original text)

12. As previously noted, neither the Director of Employment Standards, nor any other party, applied under section 116 to have *Aquilini* reconsidered. Surprisingly, the delegate never mentioned *Aquilini* in her submission, but did refer to the Tribunal's decision in *Stevens*, 2021 BCEST 71, to support her position that none of the workers was required to be served with a copy of the Determination. In my view, the delegate's reliance on *Stevens* is misconceived. *Stevens* did not concern the question of who is "named" in a determination, nor did it concern the Director's obligation to serve a determination on such named persons.

13. In *Stevens*, the determination was issued following an investigation that was triggered by eight complaints, but the resulting determination (in which it was concluded that no wages were owing to anyone) named 80 former employees (each of whom was named in an appendix to the determination). An appeal was filed by one of these former employees (who was not one of the original eight complainants). The appellant, who *was* served with a copy of the determination (as were all of the other 79 former employees), argued that there had been a breach of the principles of natural justice (see section 112(1)(b) of the *ESA*) because the delegate never contacted her prior to issuing the determination. In other words, the delegate in *Stevens* proceeded precisely as *Aquilini* directed – he named all of the former employees who would be affected by the determination (in an appendix) – not just the eight complainants – and he ensured that each of these 80 individuals was served with a copy of the determination.

14. *Stevens* concerned, among other things, a separate issue that was raised in *Aquilini*, namely, the rights of complainants to respond to the results of the employer's self-audit prior to a determination being issued. In *Aquilini*, the Tribunal held that such individuals had a right to be heard prior to the issuance of the determination (see para. 199). In *Stevens*, since the appellant never filed a complaint, she did *not* have any such prior right to be heard. The key excerpts in the *Stevens* decision regarding this latter matter are as follows (at paras. 18 – 21):

> Since the appellant was not a *complainant*, she was not entitled, under the *Aquilini* principle, to be afforded an opportunity to participate in the delegate's investigation. But this appeal raises a separate issue, namely, whether persons who are not complainants – but whose entitlements

> under the *ESA* might be affected by a determination – are entitled to notice of the delegate's investigation and to be afforded an opportunity to participate in it.
>
> There is nothing in the *ESA* that expressly confers on employees, who have *not* filed section 74 complaints, a right to participate in an investigation that might result in a determination regarding their entitlements under the *ESA*. Section 2(d) states that one of the purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In my view, it would inevitably lengthen and complicate section 76(2) investigations if the Tribunal were to impose (and in the absence of any enabling express statutory language) an obligation on the Director's delegates to contact, and seek submissions from, each and every employee whose rights under the *ESA* might be affected by a determination, even though they never filed a section 74 complaint.
>
> It should be borne in mind that once a determination affecting such employees' rights is issued, each employee has a separate and independent right to appeal to the Tribunal and, that being the case, their right to be heard is preserved and protected. If an individual wishes to participate in an investigation regarding their rights and entitlements under the *ESA*, that employee can file a complaint, thereby ensuring that that they will be permitted to participate in the delegate's subsequent investigation.
>
> While a delegate conducting an investigation certainly can seek submissions from a non-complainant employee (or anyone else who might have relevant information), I am not satisfied that a delegate has a *duty* to contact anyone whose rights might be affected by a determination other than the "person under investigation" (section 77) and the complainant(s). It follows that I do not accept the delegate breached the principles of natural justice by failing to seek submissions from the appellant prior to issuing the Determination. This ground of appeal is dismissed.
>
> (*italics* in original text)

15. The delegate, while acknowledging that the section 77 "opportunity to respond" to evidence produced and arguments advanced during an investigation "is different from addressing their right to be served under section 81", nonetheless says that "the principle is the same; in the interest of fair and efficient investigations under section 76(2), the Tribunal should not impose requirements on the Director's delegates that are not expressly provided by the Act."

16. The delegate's submission, in my view, misses the mark in two important respects. First, the "service" issue plainly does not concern section 77. As set out in *Stevens*, employees who never filed a complaint do not have any rights akin to those set out in section 77. Here, the issue is not whether non-complainants are entitled to participate in a delegate's investigation; rather, the issue is whether employees who were awarded wages under a determination should be served with a copy of it. This, in turn, leads me to my second concern – although the obligation to serve these latter individuals may not be expressly set out in the *ESA*, *Aquilini* (which the Director of Employment Standards never challenged) held that such individuals must nonetheless be served (this finding was based on an interpretation and application of several relevant *ESA* provisions).

17. In my view, the Director should not be able to avoid this service obligation by the subterfuge of simply not naming the employees (in an appendix, or in some other manner) in the determination or accompanying reasons. In terms of fair treatment (section 2(b) of the *ESA*), since employers have an unfettered right to

challenge an unpaid wage award set out in a determination, it only seems fair that employees who have been awarded (or denied) wages under a determination should be given an equal right to do so. Thus, they should be served with the determination so that they can file an appeal if they wish to challenge their wage award or the denial of an *ESA* benefit.

18. I might add that if the employees who are awarded (or denied) wages under a determination are not served, they will presumably at some point nonetheless be made of aware of the fact that a wage payment order has been issued. When this occurs, it may well be the case that the relatively short appeal period (see section 112(3) of the *ESA*) has expired. Thus, employees in this circumstance who wish to challenge the unpaid wage award, will have to seek an extension of the appeal period (although, as noted in *Aquilini*, if the employee was never formally served, the appeal period may never have commenced running – since the appeal period runs from "the date of service of the determination"). Either way, absent service of the determination on the affected employees, there could be considerable delay, and that situation is not in keeping with section 2(d) which refers to "efficient procedures for resolving disputes" arising under the *ESA*.

19. Finally, and with respect to the "service" issue, the delegate advanced the following justification for not serving the employees with a copy of the Determination:

> As noted, this Determination is an early step in the process of resolving a wage issue with the Employer, by which the Employer is required to calculate wages owing to its employees by implementing the interpretation of the Act provided in the Determination. In doing so, the Employment Standards Branch (the Branch) is proceeding with efficiency by ensuring the time-consuming process of an audit is initiated. It is then anticipated, after the completion of the audit, the Branch will proceed with a secondary process of reviewing the Employer's self-audit results. At this time, should they wish to do so, an employee may dispute its findings. If at that stage a further Determination is required to formally determine the wages owed to any individual employee, the individual employee(s) named would receive a copy of said document, as required by section 81.

20. While the foregoing may have reflected the delegate's intentions at the time the Determination was issued, there is nothing in the Determination itself to suggest that this proposed process would unfold as the delegate's submission suggests. As discussed in greater detail, below, the Determination included a wage payment order in favour of Champ's farm workers – the unpaid wages, plus interest, to be calculated based on the "self-audit" (conducted as directed by the delegate). There is nothing in either the Determination, or in the delegate's reasons, to suggest that the delegate intended to conduct a "secondary process" in which, presumably (as this is not clear), the amounts would be verified, and the employees would be afforded an opportunity to challenge the amount of wages awarded in accordance with the self-audit. Further, if the delegate intended to contact the 300 or so farm workers – at some point – in order to determine if they accepted the results of the self-audit, I fail to see why it would not have been more efficient to contact the workers at an earlier point in time; namely, by serving them with copies of the Determination when it was issued.

21. In my view, all of the 300 employees must be deemed to be "persons named" in the Determination, and thus should have been served with a copy of it. As noted in *Aquilini* (at para. 214), this requirement could prove burdensome, but service can be effected by sending copies of the Determination to the farm workers' last known addresses (see para. 214).

22. The delegate has indicated that she does not intend to serve the Determination on any of the 300 employees at this time since, in her submission, she is not required to do so and, in any event, service would be "premature". I reject both arguments. Nevertheless, given my ultimate view regarding the merits of this appeal, I do not find it necessary to give any directions regarding service of the Determination on these employees. However, in an appropriate case, the Tribunal could direct that employees who were not served with a determination to be provided with a copy of it, and to be afforded an opportunity to participate in an appeal proceeding – see, for example, *ESA*, section 103 and *Administrative Tribunals Act*, sections 14(c), 15, 33.

23. I now turn to the merits of this appeal.

THE STATUTORY FRAMEWORK

24. Section 16(1) of the *ESA* states: "An employer must pay an employee at least the minimum wage as prescribed in the regulations." Various minimum wage rates are set out in the *Regulation*, including "piece work" rates for farm workers. Section 18(1)(h) of the *Regulation*, the relevant wage provision for purposes of this appeal, provides as follows:

> 18 (1) The minimum wage, including 4% of gross earnings vacation pay, for farm workers who are employed on a piece work basis and hand harvest the following berry, fruit or vegetable crops, is, for the gross volume or weight picked, as follows: …
>
> (h) mushrooms $0.290 a pound / $0.639 a kg

There are other provisions in section 18 concerning posting notices and record-keeping.

CHAMP'S PIECE WORK PAY SYSTEM

25. In a letter to the delegate sent, by e-mail, on May 14, 2021, Champ's General Manager described its piece work pay system as follows:

> Champ's uses a range of piece rates, from $0.29 per pound and higher, for most grades of mushrooms, with a rate lower than $0.29 per pound for the least desirable and profitable categories of mushroom. Combined, the piece rates of the aggregate pounds picked by a worker average more than $0.29 per pound. However, if for any reason such average results in a piece rate below $0.29 per pound, Champ's top up the worker's wages [*sic*] to ensure that she or he is earning no less than $0.29 per pound picked. We also explained how this practice benefitted Champ's workers, making it a win-win situation for employer and employee.

26. In this same May 14th letter, Champ's General Manager explained how its "averaging" piece work payment system benefitted both Champ's and its farm workers:

> We adopted this averaging method for two reasons. First, under this approach, the majority of workers (over 77.5% based on the previous four-month period) earn greater than the $0.29 minimum piece rate for each pound of mushrooms harvested (regardless of category) in each pay period, while the remaining 22.5% earn a minimum of $0.29 for each pound of mushrooms harvested (regardless of category) in each pay period. Second, this method incentivizes workers to pick the higher grade (and more profitable) mushrooms that benefit both Champ's and the

> employee. Champ's gets high grade, more profitable mushrooms, and the employees are rewarded with a higher average piece rate. As noted, this allows Champ's to pay employees average piece rates exceeding the minimum $0.29 piece rate, rather than paying workers a flat $0.29 pay rate (with no ability to earn a higher rate). It also avoids having Champ's end up with too many low-grade mushrooms that it is unable to sell or has to sell at a loss. In addition, this method has allowed Champ's the financial ability to provide these workers with extended medical benefits and a retirement savings plan (temporary foreign workers who comprise a portion of our harvesting employees are eligible for the extended medical benefits, but not the retirement savings plan). These benefits would not be available if Champ's was following a flat $0.29 per pound piece rate. As noted on the call, this is a clear win-win situation, which is very hard to come by in piece rate compensation situations.

27. At this juncture, I think it important to stress that the delegate seemingly accepted Champ's description of the structure and operation of its piece work payroll system. There is nothing in the delegate's reasons indicating that the confidential complainant was, at any time, paid less than $0.29 for each pound of mushrooms harvested. The complainant appears to have been under the impression that Champ's was actually (as opposed to notionally) paying less than $0.29 per pound for certain grades of mushrooms, but the delegate's reasons do not indicate that the complainant's employment contract obliged Champ's to pay the higher than minimum rates for the higher rated mushroom categories and, in addition, at least the minimum wage for the grades that were rated at less than the minimum wage in the formula. Further, even if that had been the complainant's understanding, that would be somewhat curious since, in that event, there is absolutely no reason to rate any mushroom grade at less than the minimum wage. Thus, for purposes of this appeal, I will accept Champ's description with respect to the structure and operation of the piece work payroll system. The delegate's reasons do not indicate if the delegate confirmed the results of Champ's "self-audit" with the confidential complainant, or with any of the other farm workers. My review of the section 112(5) record leads me to conclude that she did not confirm the self-audit results with anyone.

THE DELEGATE'S INVESTIGATION

28. On March 11, 2021, a Champ's farm worker filed a confidential complaint with the Employment Standards Branch (see section 75) and this complaint, in turn, triggered a broader investigation (see section 76) into Champ's payroll practices regarding its mushroom pickers. The confidential complainant indicated on the complaint form that Champ's was not paying "the same piece rate of $0.29c [*sic*] for a pound of picked mushrooms". The complainant attached a wage statement that showed earnings for various categories of mushrooms all with a 0.00 rate, but also showing the total number of units picked for each mushroom category and the total earnings for each category. The complainant also appended a handwritten list of the various per pound piece rates for various types of mushrooms, ranging from 15 cents to 35 cents. Finally, the complainant appended a copy of what appears to be their signed "Employment Agreement" (although the signature is redacted in the section 112(5) record).

29. On April 21, 2021, the delegate wrote to Champ's advising that the Employment Standards Branch had received a confidential complaint "alleging employees are paid below the minimum piece rate ($0.290 a pound / $0.636 a kg for mushrooms) provided in the [*Regulation*] for picking some grades of mushrooms". The delegate demanded certain payroll records which the delegate indicated would be reviewed to

determine if any wages were owed and, if so, "Champ's Fresh Farms Inc. will be given the opportunity to conduct a self-audit".

30. Champ's response to the complaint and investigation was essentially three-fold. First, it maintained that its piece rate system fully complied with section 18(1)(h) of the *Regulation*. Second, it asserted that it had governmental approval to implement its payroll system. Third, if the Employment Standards Branch insisted that if all mushrooms picked, regardless of category, were rated at 29 cents per pound, it would be required to fix that flat rate for all mushroom categories which, in turn, would leave about 75% of its farm workers "much worse off (earning less pay and benefits)", and that it might have to reduce its workforce.

31. In due course, Champ's was directed to conduct a "self-audit" covering the period from April 21, 2020 to April 20, 2021, based on its farm workers receiving 29 cents per pound for those mushroom categories where the piece rate was fixed at less than this amount in its formula. On June 21, 2021, Champ's submitted the results of its self-audit to the delegate:

> …we have taken the additional time to complete the self-audit and confirm we have calculated an amount of $391,779 based on the criteria outlined in your email of May 7, 2021 and $378,897 if we were only to include employees that remain with us 1 year on. Please see attached the audit spreadsheet showing the amounts calculated under the Branch's calculation method.

32. Champ's nonetheless maintained that its piece rate payment system fully complied with the *ESA* and *Regulation* and, that being the case, it was not prepared to make a voluntary payment to its farm workers. It requested that a determination be issued.

THE DETERMINATION

33. On July 7, 2021, the delegate issued the Determination now under appeal together with her reasons. The delegate levied two separate $500 monetary penalties (see section 98 of the *ESA*) against Champ's based on its contraventions of sections 18(1)(h) of the *Regulation* (failure to pay minimum piece rate wage) and 27 of the *ESA* (failure to provide compliant wage statements to employees).

34. In addition, the delegate "require[d] [Champ's] to do the following":

1. Within 5 days of the date of this determination, post security in the amount of $200,000.00 in the format under section 100(1)(a) of the Act.
2. Within 30 days of the date of this determination, finalize the preliminary self-audit completed by Champ's Fresh Farms Inc. during the course of this investigation to calculate all wages, in accordance with section 18(1) of the Regulation, payable to all employees for the period of April 21, 2020 to April 20, 2021, including accrued interest.
3. Within 60 days of the date of this determination, pay employees all wages determined payable and provide proof of these payments, including copies of wage statements that comply with section 27 of the Act, to the Director.

35. In her reasons, the delegate set out her analysis and findings. With respect to Champ's argument that it had some sort of governmental authority or approval to implement its piece work system, the delegate held (at page R6):

> Regarding the videoconference Champ's claims to have attended on January 31, 2020 during which Champ's was given the impression its practice was in compliance with the Act, this meeting was likely a consultation. Therefore, while it is unfortunate Champ's mis-interrupted [*sic*] the other participants' responses as being confirmation Champ's practice was legal, none of the attendees of this meeting were the Director of Employment Standards (the Director), nor were they delegates of the Director. As such, they did and do not possess the authority to interpret or apply the Act. Regardless of what may have been said in this meeting or the reasons for which Champ's implemented its current pay structure, I find Champ's employees are paid below the minimum piece rate provided in section 18(1) of the Regulation for the weight of some grades of harvested mushrooms.

36. The delegate determined that Champ's piece work system did not comply with section 18(1)(h) of the Regulation (at page R5 – R6):

> There is no dispute Champ's records show some grades of mushrooms are paid at a piece rate less than the minimum piece rate permitted by the Regulation. While Champ's acknowledges this fact, Champ's also argues since the average piece rate earned by an employee in a pay period is more than the minimum $0.29 per pound, Champ's is in compliance with the legislation.
>
> As the requirements of the Act and Regulation are minimum standards, it is acceptable for Champ's to assign higher than minimum piece rate to some grades of mushrooms. With that said, it is not acceptable to assign a piece rate for lower grade mushrooms that is below the minimum piece rate for the crop. As a matter of law, the Act identifies wages in the context of work performed by an employee. 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. A unit represents the performance of work for which the worker is entitled to a wage. A farm worker employed on a piece rate is entitled to the minimum wage for each unit completed. In the circumstances of this case and at the relevant time, the Regulation provides a minimum wage for piece rate employees picking mushrooms based on "a pound"; in other words, each pound of mushrooms harvested represents a unit of work and entitles the employee to a piece rate that is at least equal to the minimum wage for that unit of work. The Act does not allow for the minimum wage for farm workers employed on a piece work basis to be calculated on a daily, weekly, or pay-period basis. Accordingly, when a worker harvests mushrooms at a base rate of, say, $0.23 per pound, they are actually working for less than the minimum wage as set out in section 18 of the Regulation. The fact the piece rate workers earned a higher-than-minimum piece rate for other grades of mushrooms does not negate the fact that workers still earned less than the minimum piece rate for some varieties of mushrooms.
>
> Despite Champ's position its current payment system is beneficial to employees, this does not exempt Champ's from the requirements of the Act and Regulation. Section 4 of the Act provides the requirements of the Act and the Regulations are minimum requirements and any agreement between an employer and an employee to waive these requirements is with no effect. As such, despite the Employment Agreement between Champ's and its employees stating employees will be paid on an average poundage basis, Champ's is unable to calculate an employee's piece rate

> based on their total earnings in a pay period, divided by the total number of pounds they picked. This is not to say Champ's cannot pay its employees more than the $0.29 per pound minimum but, rather, it just simply cannot pay any pound of mushrooms at an amount less than the $0.29 per pound minimum, regardless of the grade of product.

37. Having determined that Champ's piece work payroll scheme did not comply with section 18(1)(h) of the *Regulation*, the delegate then issued certain orders and directions, including finalizing its "self-audit" for the period April 21, 2020 to April 20, 2021, and paying all outstanding wages (plus interest calculated in accordance with section 25 of the *Regulation*) "within 60 days of the date of this determination" (page R7). Champs's was directed to provide proof of payment within the 60-day time frame.

38. The delegate also ordered Champ's "to post [within 5 days] a security in the form of an irrevocable letter of credit or an acceptable security as defined by section 8 of the Bonding Regulations [in the amount of $200,000]…[to] be retained by the Branch until Champ's has complied with this determination and the self-audit has concluded" (page R7). The delegate noted that she considered the $200,000 security bond to represent "between 50-60% of the total wages outstanding" (page R7).

39. I understand that Champ's has completed the self-audit and has also posted the $200,000 security as directed. I previously addressed compliance with the delegate's order regarding the payment of wages in my discussion, above, regarding Champ's suspension request.

40. I now turn to Champ's arguments in support of its appeal.

REASONS FOR APPEAL

41. As noted at the outset of these reasons, Champ's appeals the Determination on the sole ground that the delegate erred in law. In particular, Champ's says that the delegate either misinterpreted or misapplied, section 18(1)(h) of the *Regulation*, and otherwise "mischaracterized or misapprehended relevant facts". A finding of fact may constitute an "error of law" if the factfinder "acts on a view of the facts which could not reasonably be entertained": *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (B.C.C.A.). In essence, Champ's says that its piece rate payroll system fully complies with section 18(1)(h) of the *Regulation*, and that the delegate erred when she determined otherwise.

42. Champ's challenges these particular factual findings:

- "There is no dispute Champ's records show some grades of mushrooms are paid at a piece rate less than the minimum piece rate permitted by the Regulation" (delegate's reasons, page R5).
- "Accordingly, when a worker harvests mushrooms at a base rate of, say, $0.23 per pound, they are actually working for less than the minimum wage as set out in section 18 of the Regulation. The fact the piece rate workers earned a higher-than-minimum piece rate for other grades of mushrooms does not negate the fact that workers still earned less than the minimum piece rate for some varieties of mushrooms" (delegate's reasons, page R6).

43. With respect to the first of these two factual findings, Champ's says: "In fact, these piece rates [i.e., the rates fixed at less than 29 cents/pound] are integrated with higher piece rates that exceed the minimum

piece rate of the Regulation and every employee earns $0.29 pp or more (77.5% earn more)." Champ's describes the mechanics of its piece rate incentive program as follows:

> Employees get the greater of (i) the minimum piece rate ($0.29 pp), or (ii) or the graded piece rates under the PR System (which employs different piece rates for different grades to allow employees to earn more than $0.29 pp).
>
> Low grade mushrooms are rated at less than $0.29 pp, while high grades are rated more than $0.29 pp. If any pickers pick a much greater number of low grade mushrooms such that their notional wage would be less than $0.29 pp, then Champ's pays those employees $0.29 pp – which meets the minimum piece rate in the Regulation. Approximately, 22.5% of pickers are paid the minimum piece rate. The other 77.5% of pickers earn greater than $0.29 pp. Fundamentally, the PR System in [*sic*] a unified piece rate system – it is not an independent set of rates for each mushroom grade. Without the piece rate pricing working together, Champ's would not be able to sufficiently differentiate the piece rates for each grade to incentivize the right picking behavior or to provide employees with the potential to earn much more than $0.29 pp.

44. Champ's says that its piece work system, overall, pays farm workers beyond its minimum legal obligations, since more than three-quarters of the workers earn more than the regulatory minimum of 29 cents per pound. The other workers are not denied any statutory or regulatory benefit since, regardless of the type of mushrooms picked, their wages are "topped up" so that they are paid 29 cents per pound in each pay period. Further, Champ's says that by setting differential rates, based on the type of mushroom picked, farm workers are incentivized to pick higher rated mushrooms rather than focussing on larger weight, but lower quality, and hence lower market value, mushrooms. Champ's maintains that its system has improved the profitability of its operation which, in turn, has "allow[ed] it to introduce health and dental benefits and a RRSP matching plan" for its farm workers.

45. With respect to the delegate's second factual finding, Champ's notes that all per pound rates for mushrooms fixed at less than 29 cents per pound are, *notional*, not actual rates, and that the delegate erred by "selectively focus[ing] on only part of the [piece rate] System, thereby erring in law". Champ's notes, and I agree, that it could have equally implemented an unquestionably compliant system where all mushrooms picked are paid at 29 cents per pound, with a "bonus" or "commission" paid to employees who harvest comparatively higher graded than lower graded mushrooms.

46. In support of its piece work system, Champ's also relies on sections 2(a), (b) and (e) of the *ESA*. These provisions refer to particular purposes that underlie, and are intended to guide the interpretation and application of, the *ESA*, namely that:

- "employees in British Columbia receive at least basic standards of compensation and conditions of employment";
- the ESA should "promote the fair treatment of employees and employers"; and
- the ESA should "foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia".

I might also add that section 2(c) – encouraging open communication between employers and employees – might also be relevant to this appeal.

47. With respect to these purposes, Champ's says that its piece work system "ensures that its employees in BC receive at least $0.29 pp of mushrooms picked, which is the minimum standard of piece rate compensation set out in Regulation" [*sic*]. Champ's says that its payment scheme generates mutual benefits – most workers receive more than minimum wage and it "gets a better quality, more profitable crop". Finally, Champ's says that its piece work payment system leads to a more productive and better paid workforce, with lower turnover compared to other similar operations, thus fully supporting the objective set out in section 2(e) of the *ESA*.

48. In its submissions to the delegate, Champ's appeared to argue – but without using this term – that it was entitled to argue "officially induced error" (see *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] 1 S.C.R. 420) regarding the continuance of its piece work payment system. Champ's General Manager apparently attended a videoconference on January 31, 2020, that included "the Executive Director for Labour Policy and Legislation, the Assistant Deputy Minister, representatives from the Ministry of Agriculture and Mushroom Canada, and three other large mushroom producers in B.C." (delegate's reasons, page R4). The General Manager outlined how Champ's piece rate payment system operated, and "[understood Champ's] practice was in compliance with the applicable legislation" (page R4).

49. The delegate held (at page R6) that even if Champ's legitimately believed that its system was lawful, based on its understanding gleaned at the January 31, 2020 videoconference, that did not immunize Champ's from being held liable for having contravened section 18(1)(h) of the *Regulation* (see para. 35, above).

50. Although Champ's referred to this videoconference meeting in its appeal submission, it does not appear to be challenging the delegate's finding that any representations that might have been made during this meeting were not binding on the Director of Employment Standards. Champ's submission regarding this meeting – and the delegate's findings regarding the legal import of the meeting – are as follows:

> …the Director incorrectly assumes that Champ's misinterpreted the other participants' responses as being confirmation Champ's practice was legal. Champ's evidence is that it explained its PR System to the Ministry of Labour and was told that it did not offend the ESA/Regulation. What is relevant is that the Ministry of Labour did not have any concerns and did not direct Champ's to check the PR System with the Director. This reflects the obvious.

51. In summary, Champ's continues to assert that its piece work payment system fully complies with the *ESA* and the *Regulation* and asks the Tribunal to cancel the Determination.

THE DIRECTOR'S SUBMISSION

52. The Director's legal counsel, on behalf of the Director, does not dispute the fundamental mechanics of Champ's piece work payment system. The Director, after first noting that the system incorporates differential rates for various grades of mushroom, then described the daily payment calculation as follows: "Using these piece rates, [Champ's] then looks at the aggregate pounds picked by a worker in a day and if the average per pound falls below $0.29, [Champ's] then 'tops up' the average rate to the statutory minimum."

53. The Director says, however, that the system under review here is not materially different from that in *All Seasons Mushrooms Inc.*, 2018 BCEST 97, where the Tribunal held the piece work system did not comply with section 18(1)(h) of the *Regulation*. I will discuss the *All Seasons* decision in greater detail, below.

54. The Director maintains that Champ's payroll system effectively allows it "to cheat its piece rate workers of the promise of a higher piece rate for harvesting some grades of mushrooms because a daily averaging of piece rates logically requires the higher rate to be reduced at the expense of ensuring the sub-minimum rate meets the minimum threshold set out in the *Regulations*" (*sic*).

55. The Director also says that Champ's averaging system undermines the policy goals implicit in section 18(2) of the *Regulation* which states that employers must prominently display at the work site a notice including the following information: (a) the volume of each picking container being used; (b) the volume or weight of fruit, vegetables or berries required to fill each picking container; and (c) the resulting piece rate. The Director submits that "the objective of [section 18(2)] is not achieved if the 'resulting piece rate' is uncertain because it can be affected by an after the fact 'averaging' calculation."

56. Finally, the Director notes that even if Champ's piece work payroll system gives it the financial capacity to offer its farm workers additional non-statutory benefits, such as a health and dental plan and an RRSP matching program, it is nonetheless a mandatory obligation to pay the minimum wage for all work and that to the extent the workers agreed to a non-compliant system, that agreement is void under section 4 of the *ESA*: "The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2), has no effect."

FINDINGS AND ANALYSIS

57. The Director, as noted above, relies heavily on *All Seasons* to support her position that Champ's payroll system contravenes section 18(1)(h) of the *Regulation*. I now turn to that decision.

58. All Seasons operated a mushroom farm that was the subject of a site inspection. At this point in time, the specified rate for mushrooms was $0.249 per pound. All Seasons' payroll system was similar to that adopted by Champ's. Some mushrooms were rated at an amount less than the minimum while other grades were rated at per pound rates above the minimum. As described by All Seasons, "*<u>If</u> 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, <u>All Seasons grosses up the wage to minimum wage</u>*" (*All Seasons*, para. 17; <u>underlining</u> in original text).

59. All Seasons' submission on appeal was essentially identical to that advanced by Champ's in this appeal (para. 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.

All Seasons argued (at para. 29) 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" (underlining in original text).

60. The Tribunal rejected All Seasons' position that its payroll system complied with section 18(1)(h) (paras. 38 – 44; 46 – 48):

> …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?
>
> In my view, it does not.
>
> 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.
>
> 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.
>
> A unit represents the performance of work for which the worker is entitled to a wage.
>
> A farm worker employed on a piece rate is entitled to the minimum wage for each unit completed.
>
> 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.
>
> * * * *
>
> 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.
>
> 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.
>
> 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.

61. With respect to this latter point regarding the averaging or adjustment of the "grade list", the evidence before me in this appeal is somewhat different. The delegate's investigation was triggered by a confidential complaint. This complainant, as noted above, appended some documents to his complaint

including a handwritten (seemingly, by the complainant, as it appears to be in the same handwriting as the complaint) per pound "pay list" for various types of mushrooms and a signed "Employment Agreement" (which appears to be the complainant's agreement, based on the handwriting, but this is not clear). In the absence of any contrary evidence, I will proceed on the basis that this agreement reflects the employment agreement for all of Champ's farm workers.

62. The employment agreement includes the following provisions regarding "Wages and Incentives":

> 5. This position involves hand-harvesting crops; therefore, you will be paid on a piece work basis. For all services rendered, the Company will provide you, *average piece rate on poundage pic*ked, *which will not average below the minimum piece rate of $0.29c for a pound of Mushroom picked*.
>
> 6. These piece rates may be amended from time to time and include vacation pay based on 4% of gross earnings. Wages will be paid bi-weekly and subject to lawful deductions. The terms of this Agreement remain in full force and effect notwithstanding changes to your piece rate wage.
>
> (my *italics*)

63. Thus, in this case, the farm workers were provided with a statement regarding the various piece rates for different categories of mushrooms, and were also provided with a minimum wage guarantee, namely, an "average piece rate on poundage picked, which will not average below the minimum piece rate of $0.29c for a pound of Mushroom picked." So far as I can determine, the workers were not promised that they would be paid the higher "formula rates" regardless of their overall productivity. Rather, the workers were only promised that their pay would never fall below $0.29 per pound regardless of the classification of the mushrooms picked. Save for four employees (who were apparently paid less than $0.29 per pound in error, now corrected – see delegate's reasons, page R3), all of Champ's mushroom pickers were never paid less than $0.29 per pound, and about 80% of the time, the workers were paid more than $0.29 per pound.

64. The delegate held, at page R5 of her reasons, that "there is no dispute Champ's records show some grades of mushrooms <u>are paid</u> at a piece rate less than the minimum piece rate permitted by the Regulation" (my <u>underlining</u>). In my view, this observation is inaccurate. The piece work payroll system did not guarantee that the farm workers would be paid the posted rates – and only the posted rates – for each class of mushrooms picked. Rather, the various rates were integral to a *formula* that would be used to derive the worker's earnings in each pay period. I agree with Champ's that these various rates were notional rates, set for purposes of determining the worker's actual earnings in a pay period. The only wage that was absolutely guaranteed (and paid) was a minimum of $0.29 per pound. And, of course, the workers could – and most apparently did – earn more than $0.29 per pound in each pay period.

65. At page R6 of her reasons, the delegate stated:

> The Act does not allow for the minimum wage for farm workers employed on a piece work basis to be calculated on a daily, weekly, or pay-period basis. Accordingly, when a worker harvests mushrooms at a base rate of, say, $0.23 per pound, they are actually working for less than the minimum wage as set out in section 18 of the Regulation. The fact the piece rate workers earned

> a higher a higher-than-minimum piece rate for other grades of mushrooms does not negate the fact that workers still earned less than the minimum piece rate for some varieties of mushrooms.

66. In my view, this finding fundamentally misstates the nature of Champ's piece work system. Champ's did not promise that higher rated mushrooms would invariably be paid at the higher rates, and it did not mandate that lower rated mushrooms would be paid at posted rates that were less than the regulatory minimum. Rather, these higher and lower rates were *notional* rates fixed as part of a formula used to determine the workers per pound pay which would not fall below $0.29 per pound, regardless of the various classes of mushrooms that comprised the worker's total production. For example, as I understand the system, if a particular worker picked *only* mushrooms that were rated at less than $0.29 per pound, the worker would nonetheless still be paid at $0.29 per pound for all mushrooms picked. Conversely, if the work picked *only* mushrooms rated at more than $0.29 per pound, that worker would be paid based on the rates for each class of mushrooms, and not the $0.29 per pound minimum. However, if a worker picked *both* lower rated mushrooms and higher rated mushrooms, the worker was guaranteed the *higher* of the per pound rate based on the notional rates for each class of mushroom picked, or the minimum $0.29 per pound. Champ's system guarantees that all mushrooms, regardless of class, will be paid at not less than $0.29 per pound. Accordingly, and using the language of section 16 of the *ESA*, Champ's workers received "at least the minimum wage prescribed in the regulations". Of course, to the extent that the employee's contract calls for more than the minimum wage, the employer must pay that higher wage rate. However, there is no evidence in the record before me that Champ's ever failed to pay the contracted wage to its employees, save for the four workers who were paid a lower wage rate in error.

67. At page R6 of her reasons, the delegate concluded: "I find Champ's employees are paid below the minimum piece rate provided in section 18(1) of the Regulation for the weight of some grades of harvested mushrooms." The apparently uncontested evidence before the delegate was that, except for the four employees mentioned at page R3 of her reasons, all workers were paid at least $0.29 per pound for all mushrooms picked, regardless of how those mushrooms might have been classified. The Determination is predicated on the notion that since some classes were rated at less than $0.29 per pound, those classes of mushrooms had to be paid at the minimum rate, while all harvested mushrooms in higher rated classes were still to be paid at the higher posted rates. However, as I discussed above, the employment contract did *not* guarantee that higher rated mushrooms would inevitably be paid at the higher rate; rather, the differential rates were part of a *formula* used to determine per pound payments, and the agreement specifically provided that workers would *never* be paid less than $0.29 per pound.

68. In my view, this is not a section 8 situation where the workers were misled about how their pay would be calculated. The employment contract provisions regarding the piece work payment system required workers to be paid at least the minimum $0.29 per pound, but the payment system allowed workers to earn more than the minimum rate depending on their productivity. The system was intentionally designed to provide an economic incentive for the workers to endeavour, as far as possible, to harvest higher value mushrooms.

69. Sections 2(a), (b), (c) and (e) set out several purposes of the *ESA*, and these stated purposes should guide the interpretation and application of the statute's provisions.

70. With respect to section 2(a) – provision of at least basic standards of compensation – section 16(1) states: "An employer must pay an employee at least the minimum wage as prescribed in the regulations." Section

17 states that wages must be paid at least semi-monthly, and employees' pay must reflect "all wages earned by the employee" in the applicable pay period (other than vacation pay and banked overtime).

71. Section 18(1)(h) of the *Regulation* does not provide for differential per pound wage rates based on the quality or type of the mushrooms being harvested. This minimum wage provision simply requires the employer to pay not less than $0.29 per pound. Again, and save for the four employees previously noted, there is no evidence before me that any employee was paid less than the specified minimum per pound rate. In my view, the delegate's interpretation of Champ's piece work payroll system created a supplementary payment provision that clearly was not included in the actual wage agreement. The effect of the Determination is to require Champ's to pay the higher notional rate for all mushrooms harvested that qualify for this higher rate, but to also pay $0.29 per pound for all mushrooms harvested that do not fall into the higher value classes. However, the wage agreement clearly stated that the employees would be paid an average rate, and that the employee would be paid this average rate provided it was higher than the minimum wage rate. In the latter event, the worker would be paid the minimum wage. In these circumstances, I fail to see how section 18(1)(h) has been contravened, since the worker *is* being paid $0.29 per pound "for the gross volume or weight picked".

72. In *All Seasons* the Tribunal observed (at para. 43) – and I entirely agree with this observation – that "a farm worker employed on a piece rate is entitled to the minimum wage for each unit completed." I also agree with the Member in that case when he stated (at para. 44): "…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." But I do not agree with the Member that an averaging system necessarily constitutes an attempt to "cheat" workers because "'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" (para. 46). In this instance, as I have previously noted, the workers were not *guaranteed* the higher rate, irrespective of their harvesting activity. Rather, the higher rates were part of a *formula* used to calculate their earned wages in a pay period (as directed by section 17(1) of the *ESA*), based on the gross weight of all mushrooms harvested. If, as result of the application of the formula, the worker earned less than the minimum wage, the worker would nonetheless be paid the minimum wage (as directed by section 16(1) of the *ESA*). If the application of the formula resulted in a higher than minimum wage amount, the worker was paid this higher amount.

73. Further, and with respect to the notion of "cheating" workers out of their earned wages, the Member in *All Seasons* appeared to place some weight on his scepticism regarding whether the workers in that case were actually informed that "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" (para. 48). But in this case, the Champ's piece work system is not opaque – the employment contract specifically states that the per pound rate is an "average" (the average being calculated based on both higher and lower notional rates which vary depending of the class of mushroom harvested), and further states that workers will be paid at least the minimum rate of $0.29 "for a pound of Mushroom picked" (*sic*). As is clear from the confidential complaint, the workers were given information about the notional rates to be applied to various categories of mushrooms. Of course, this was both sensible and intentional, so that the workers would adjust their work habits in order to harvest the highest valued mushrooms.

74. In *All Seasons* the Member also rested his decision, at least in part, on his interpretation and application of section 18(2) of the *Regulation*:

> 18 (2) Each employer of farm workers must display, in a location where they can be read by all employees, notices stating the following:
>
> (a) the volume of each picking container being used;
>
> (b) the volume or weight of fruit, vegetables or berries required to fill each picking container;
>
> (c) the resulting piece rate.

The Member noted (at para. 47) that "the objective of [section 18(2)] is not achieved if the 'resulting piece rate' is uncertain because it can be affected by some undefined "averaging" calculation. In this case, the delegate did not find that Champ's contravened section 18(2) – monetary penalties were issued only with respect to section 27 of the *ESA* and section 18(1)(h) of the *Regulation*. Further, as noted above, the "averaging" formula used in this case was not undefined. There is no evidence that the mechanics of the formula was not clearly communicated to the workers; indeed, the evidence that is in the record suggests precisely the opposite (consistent with section 2(c) of the *ESA*).

75. In my view, there are important differences between the facts in this case and those in *All Seasons* thereby justifying different outcomes. Even if one accepts that there are no material factual differences between these two cases, I am not bound by *All Seasons*, and I decline to apply it to this case since I am not persuaded by its underlying fundamental rationale.

76. It may be that Champ's piece work system does not readily lend itself to the worker being able to readily calculate their final piece rate (other than a minimum $0.29 per pound) while the harvesting work is being undertaken. However, as previously noted, the delegate did not find that Champ's contravened section 18(2), and I consider sections 18(1)(h) and 18(2) to be independent obligations in the sense that the contravention of one provision does not inevitably lead to a conclusion that the other provision has been contravened.

77. I am unable to find that Champ's piece work payroll system is "unfair" to its farm workers (see section 2(d) of the *ESA*), particularly since the system guarantees that all workers will receive at least the minimum per pound rate for all mushrooms harvested and, according to Champ's uncontested evidence, more than 80% of the time, the workers actually earn more than the minimum wage (delegate's reasons, page R3). Champ's piece work system encourages higher productivity and incentivizes the workers to earn wages that are higher than the regulatory minimum (consistent with section 2(e) of the *ESA*). It should also be noted that under the Champ's piece work incentive system, the workers received at least $0.29 per pound *plus* vacation pay, even though the regulatory minimum is stated to include vacation pay. Thus, even for those workers who only earned $0.29 per pound in some payroll periods, they were nonetheless paid more than the minimum wage.

78. For the foregoing reasons, I am satisfied that the delegate erred in law with respect to her interpretation and application of section 18(1)(h) of the *Regulation*, given the evidence before her. It follows that the Determination must be varied by cancelling the delegate's order to post $200,000 security, to finalize a

"self-audit", and to pay wages calculated to be owing in accordance with the self-audit (i.e., items numbered 1, 2 and 3 on page D1 of the Determination).

79. The delegate levied two separate $500 monetary penalties in light of her finding that Champ's contravened sections 27 of the *ESA* and 18(1)(h) of the *Regulation*. With respect to the latter penalty, although I am satisfied that Champ's piece work system complies with section 18(1)(h) of the *Regulation*, Champ's conceded that four employees were not paid the minimum wage (see delegate's reasons, page R3) in some pay periods. Even if this underpayment was the result of a payroll error, or some other oversight (and has now, apparently, been rectified), the fact remains that these four employees did not receive the regulatory minimum wage for at least one payroll period, and thus Champ's contravened section 18(1)(h) with respect to these employees. Accordingly, the section 18(1)(h) penalty must be confirmed.

80. Section 27(1) of the *ESA* sets out various information that must be provided in an employee's wage statement. The delegate's reasons for levying the section 27 penalty are as follows (page R7 – R8):

> Section 27 of the Act requires employers provide employees wage statements stating among other things: the hours worked by the employee; the employee's wage rate, whether paid hourly, by piece rate or other incentive basis; and if the employee is paid other than by the hour or by salary, how the wages were calculated. I find the wage statements provided by Champ's to its employees failed to show the different rates at which the various grades of mushrooms were paid. Accordingly, I find Champ's contravened section 27 of the Act and I impose a $500.00 penalty.

81. The complainant attached a wage statement ("Statement of Earnings and Deductions") to their complaint. I understand that this statement is similar to that provided to all of Champ's mushroom harvesters. The statement includes various categories of mushrooms, but the rate to be applied for each category is fixed at "0.00". The "current hrs/units" (presumably in pounds) and the "current amount" (in dollars), as well as the "year to date" figures for the units and amounts are shown on the statement. The "rate" for each class can be readily calculated from the statement by simply dividing the "current amount" by the "current units", but the actual "rate" is shown, for every class, as "0.00". Since the actual payment to the employee is based on a formula, it follows that the calculation of the net amount payable to the employee should be indicated on the statement, but the statement does not include such a calculation. Section 27(1)(h) requires the following information to be included on the wage statement: "if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for" (my underlining). Champ's statements do not show the requisite wage calculations. In light of this deficiency, I am satisfied that Champ's wage statements do not comply with section 27(1)(h) and, that being the case, a $500 penalty was appropriately levied.

82. To summarize, I am cancelling the delegate's directions and orders (items numbered 1, 2 and 3 set out on page D1 of the Determination) and confirming the two $500 monetary penalties. I wish to stress, however, that although the wage payment order set out in the Determination is being cancelled, if the confidential complainant, or any of the approximately 300 employees, wishes to pursue a claim that they have not been paid at least the minimum wage for their harvesting work, or that they have not been paid in accordance with their employment contract, this decision does not foreclose their right to pursue such a claim.

ORDERS

83. Pursuant to section 115(1)(a) of the *ESA*, the Determination is varied by cancelling the order requiring Champ's to post $200,000 security, to complete a "self-audit", and to pay its employees all of the wages determined to be owed as a result of the self-audit (items numbered 1, 2, and 3 at page D1 of the Determination).

84. Pursuant to section 115(1)(a) of the *ESA*, the two $500 monetary penalties levied against Champ's by way of the Determination are confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal