

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Sidhu Blueberry Farms Ltd.

("SBFL")

- 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: Maia Tsurumi

FILE No.: 2020/169

DATE OF DECISION: March 26, 2021

DECISION

SUBMISSIONS

Gurdeep Sidhu

on behalf of Sidhu Blueberry Farms Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Sidhu Blueberry Farms Ltd. (“SBFL”) has filed an appeal of a determination issued by Tara MacCarron, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on November 4, 2020. The Delegate determined SBFL was liable to Sarabjeet Singh Gill (the “Complainant”) for: (1) \$11,043.30 in wages; (2) \$469.68 of annual vacation pay; (3) \$698.59 in compensation for length of service; and (4) \$137.71 in accrued interest. The Delegate imposed administrative penalties of \$1,500.00 for contraventions of sections 17 (paydays), 18 (payment of wages upon termination), and 63 (compensation for length of service) of the *ESA*.
2. SBFL appeals the Determination on the grounds that the Delegate failed to observe principles of natural justice in making her Determination.
3. SBFL also asks the Tribunal to extend the statutory appeal period from December 14, 2020 to January 31, 2021 under sub-section 109(1)(b) of the *ESA*.
4. For the reasons set out below, I decline to grant the extension of time to file the appeal.
5. My decision is based on the submissions in the Appeal Form, the additional written submissions made by SBFL (the “Appeal Submissions”), the sub-section 112(5) record (the “Record”), and the Reasons for the Determination (the “Reasons”).

ISSUE

6. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether an extension of the statutory appeal period should be granted, and if granted, whether this appeal should be allowed or dismissed pursuant to sub-section 114(1)(f).

THE DETERMINATION

Background

7. On June 19, 2020, the Complainant filed a complaint (the “Complaint”) with the Employment Standards Branch (the “Branch”), alleging he was owed wages and compensation for length of service.
8. SBFL is a company incorporated in British Columbia. It operates a blueberry farm in Langley and Abbotsford. The Complainant was employed as a farm worker starting on June 17, 2019.

Issues Before the Delegate

9. The issues before the Delegate were whether the Complainant was owed:
- a. overtime wages;
 - b. compensation for length of service; and/or
 - c. annual vacation pay.

The Delegate's Determination

10. On November 4, 2020, the Delegate issued the Determination, concluding that the Complainant was owed:
- a. \$11,043.30 in wages for 797.35 unpaid hours of work;
 - b. \$698.59 as one week's compensation for length of service;
 - c. \$469.68 for unpaid vacation pay; and
 - d. \$137.71 as interest under section 88 of the *ESA*.
11. There was no dispute that:
- a. the Complainant worked as a farm labourer for SBFL starting on June 17, 2019;
 - b. the Complainant was paid biweekly for 40 hours per week until March 31, 2020;
 - c. the Complainant's last day of work at SBFL was March 25, 2020;
 - d. the Complainant contacted SBFL in May 2020 about returning to work; and
 - e. SBFL did not respond to the Complainant's May 2020 communications.
12. The Complainant said SBFL forced him to work excessive hours each week and he typically worked from 8:00 a.m. to 10:00 or 11:00 p.m., seven days a week unless he was sick. If he was sick, he would stay home. The Complainant said he kept a record on his cell phone of the hours he worked. SBFL told him it could only pay him for 40 hours per week as set out in the employment letter.
13. The Complainant told the Delegate that on March 25, 2020, he told SBFL he was experiencing COVID-19-like symptoms and therefore he could not come to work. SBFL told the Complainant he had to leave its property and self-isolate in private accommodation. During his self-quarantine, the Complainant did not receive any salary, benefits, or payment for his new accommodations. The Complainant said his health was restored in the second week of May and he was capable of returning to work, so he contacted SBFL to say he would like to return to work and to his accommodations on its property. SBFL did not respond to his communications. Although the Complainant received a Record of Employment saying he quit his employment, he claimed he was terminated.
14. In support of his Complaint, the Complainant submitted the following evidence: (1) a record of hours he kept on his cell phone; (2) a breakdown of all 19 cheques he received during his employment; (3) copies of his cheques and wage statements from SBFL; (4) two e-mails he sent in May 2020 to SBFL, which say

he was available to return to work; (5) his work permit; (6) his Offer of Employment letter; (7) his employment contract; and (8) timestamped photographs he took showing him working at various hours in the afternoon or night.

15. Gurdeep Sidhu (“Mr. Sidhu”), SBFL’s Principal Secretary, gave evidence to the Delegate on behalf of SBFL on August 18, 2020. He submitted that the Complainant quit his employment on March 25, 2020, in order to receive the Canada Emergency Response Benefit. He also said the Complainant only worked 40 hours each week and was paid appropriately for all hours worked. Mr. Sidhu said SBFL maintained a daily record of the hours worked by the Complainant and that he would review these records and compare them to the Complainant’s record of hours.
16. In response to the Delegate’s Preliminary Findings letter, dated October 9, 2020, SBFL submitted that the Complainant worked a total of 1116 hours between June 17, 2019 and December 15, 2019 and was paid for 960 of these hours in 2019. SBFL said the Complainant did not work at all in January 2020 because of poor weather, but he was paid for 160 hours, 156 of which were the remaining unpaid hours from the 1116 hours he worked in 2019. SBFL said the Complainant was paid for 40 hours per week to March 31, 2020, even though he did not work from March 25, 2020 onwards. SBFL did not consider it necessary to respond to the Complainant’s May 2020 e-mails because he had quit.
17. In support of its version of events, SBFL submitted the following documents: (1) the Complainant’s wage statements; (2) the Complainant’s Record of Employment (“ROE”); (3) a record of hours worked by the Complainant; and (4) a notice from WorkSafeBC to SBFL saying the Complainant had filed a complaint against it.

Wages

18. In addition to the testimony from both parties, the documentary evidence consisted of the record of hours the Complainant kept on his cell phone, his wage statements and cheques, and a record of hours submitted by SBFL. The latter was submitted in response to the Preliminary Findings letter, dated October 9, 2020, although the Delegate had asked for this information in a telephone conversation with Mr. Sidhu on August 18, 2020, and sent a Demand for Employer Records on August 31, 2020. The wage statements show the Complainant was paid for 40 hours of work per week on a biweekly basis. The Complainant’s record of hours indicated he worked, but was not paid, for 797.35 hours from June 17, 2019 to March 25, 2020. SBFL’s record of hours indicated he worked 57 to 126 hours per biweekly pay period, except for January 2020 when he worked no hours.
19. The Delegate said she considered the evidence provided by each party, but preferred to rely on the Complainant’s record of hours over the number of hours on the wage statements or SBFL’s record of hours. She explained the basis for her decision on credibility. It did not make sense that SBFL would have kept the record of hours it submitted because it showed the Complainant worked over or under 80 hours in a pay period, but the wage statements showed he was paid 80 hours each pay period. SBFL’s claim that the Complainant did not work any hours in January, but then was paid in that month for almost exactly the same number of hours of wages owing for 2019 brought its credibility into question. SBFL’s record of hours also contradicted its previous statement that it could only pay the Complainant for 80 hours each pay period and Mr. Sidhu’s statement on August 18, 2020, that the Complainant only worked 40 hours each week.

20. Thus, the Delegate concluded SBFL owed the Complainant wages for 797.35 hours of work under section 17 of the *ESA*. As he was a farm worker, Part 4 of the *ESA* (Hours of Work and Overtime), except for section 39, did not apply to him: section 34.1 of the *Employment Standards Regulation* (“*ESR*”). Therefore, he was not entitled to overtime, but he was owed regular wages of \$11,043.30.

Compensation for length of service

21. The Delegate noted the onus is on an employer to show it has relieved itself of its obligations to pay compensation for length of service by showing that the employee quit or that the proper amount of notice was given to the employee. The Delegate said SBFL chose not to provide any evidence except to say it did not think it necessary to respond to the Complainant’s attempts to contact it in May 2020 because he was the one who quit. The Delegate did not find SBFL’s statement, considered in light of the Complainant’s evidence, established it had relieved itself of its obligation to pay compensation for length of service. Therefore, the Delegate concluded the Complainant was terminated on May 19, 2020, which was the last day he tried to contact SBFL.
22. Under section 63 of the *ESA*, the Complainant was owed one week of regular wages as compensation for length of service (based on an average of 50.44 hours worked per week): \$698.59.

Annual vacation pay

23. Based on her findings about unpaid wages and compensation for length of service, the Delegate concluded the Complainant was owed \$469.68 of vacation pay (at 4%) under section 58 of the *ESA*.

Penalties

24. The Delegate applied mandatory administrative penalties of \$1,500.00 for contraventions of sections 17, 18, and 63. Section 18 required SBFL to pay the Complainant all outstanding wages within 48 hours after his employment was terminated.

ARGUMENT

25. Regarding the appeal deadline extension request, Mr. Sidhu submits that: (1) he informed the Delegate of his intent to file an appeal; (2) he had major wrist surgery and was not able to work because of the surgery or prior to that because of the injury to his wrist; and (3) because of the surgery, he needed more time to make his submissions. He provided the name and contact information of his surgeon.
26. Regarding its grounds for appeal, SBFL says the Delegate failed to observe principles of natural justice because she preferred the Complainant’s evidence and because she was biased. On appeal, SBFL reiterated its position on the Complaint it had submitted to the Delegate and also made the following additional submissions:
- a. because the Delegate did not accept SBFL’s evidence and preferred the Complainant’s evidence, the Delegate did not consider any of the evidence SBFL provided to her;
 - b. the Determination indicates the Delegate was biased against SBFL because of its deadline extension requests;

- c. the Complainant's evidence was not reliable or credible and was inadequate to support the Delegate's findings;
- d. under section 42, Part 4 of the *ESA*, an employer can establish a time bank for an employee's overtime wages and this is what SBFL did at the Complainant's request, but the Delegate failed to consider this;
- e. the Delegate failed to consider the ROE, which stated the Complainant quit;
- f. the Delegate failed to consider the evidence that the Complainant's last day of work was March 25, 2020 and because he was paid until March 31, 2020, he received compensation for length of service; and
- g. because the Complainant said his last day of work was on March 25, 2020 on the Complaint form, this was evidence that he quit on that day.

27. With its Appeal Submissions, SBFL submitted an affidavit from Mr. Sidhu stating the Complainant did not work for SBFL in January 2020 and provided contact information for SBFL's supervisor who SBFL says can confirm this fact.

THE FACTS AND ANALYSIS

28. SBFL requests an extension of time for filing its appeal from December 14, 2020 to January 31, 2021 under section 109(1)(b) of the *ESA*. I dismiss SBFL's request. My reasons are as follows.

29. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing an appeal from a Determination, the time periods established are not that unusual: *Liisa Tia Anneli Niemisto, supra*, at p. 3.

30. The Tribunal has criteria that guide it in determining whether or not to extend the time period for appeals from decisions of the Director. These criteria are set out in the *Niemisto* decision. Appellants seeking time extensions for an appeal from a Determination should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

Niemisto at p. 3; see also *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2013 BCSC 1499 at paras. 28 and 57

31. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, in my view, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.
32. SBFL provided a reasonable and credible explanation for its request for more time: Mr. Gill, its Principal Secretary, and the person who was the primary contact person for the Branch during the Delegate's investigation, had major wrist surgery, which prevented him from working.
33. SBFL filed its Appeal Form, written reasons for requesting an extension to the statutory appeal period, a copy of the Determination, and a copy of the Reasons within the statutory time limits. It also filed its Appeal Submissions regarding the appeal of the Determination itself before the requested extension deadline. I take from this that SBFL had a genuine and ongoing *bona fide* intention to appeal the Determination and the Complainant and the Director were made aware of this intention. Furthermore, a six-week extension would not unduly prejudice the Complainant or the Director.
34. Despite the above, the extension request is denied because I conclude SBFL does not have a strong *prima facie* case.
35. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case against them, are given an opportunity to reply to the case against them and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.
36. There is nothing in the Reasons, the Record, the Appeal Form, or the Appeal Submissions indicating the Delegate breached any principle of natural justice in making her Determination. I reject SBFL's submission that the Delegate was biased against it. I see nothing in the Reasons or Record to suggest any bias. The Delegate's mention of SBFL's requests for deadline extensions does not indicate bias; it was part of the procedural history of the Complaint and investigation. Furthermore, the Delegate granted all of the requested extensions and SBFL was given repeated opportunities to make submissions and submit documents. I also reject SBFL's assertions that the Delegate did not consider all of the evidence. It is clear from the Reasons, the Record, and the Appeal Submissions that she did consider all of the evidence. What SBFL complains about is the Delegate preferring the Complainant's evidence over its evidence. The Delegate's decision about the evidence was not a failure to observe natural justice.
37. Although SBFL did not raise an error of law as a ground of appeal, I considered whether the Delegate's decision was an error of law. SBFL says the Delegate should not have preferred the Complainant's evidence over its evidence and this is in essence an argument that the Delegate acted without evidence or acted on a view of the facts that could not reasonably be entertained, which in the Employment Standards Tribunal context is an error of law: see *C. Keay Investments Ltd. (Re)*, 2018 Bcest 5 at para. 36, citing *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA). SBFL also says section 42 of the *ESA* allowed it to bank the Complainant's hours and the Delegate

did not consider this, which is an argument that the Delegate erred in law by misinterpreting or misapplying the *ESA*: see *C. Keay Investments Ltd. (Re)*, *supra*.

38. I find the Delegate did not err in law. The Reasons and the Record indicate the Delegate considered all of the evidence. They also show the Delegate acted on the evidence and did not take a view of the facts that could not reasonably be entertained. The Delegate expressly referred to most of the evidence. She clearly explained what evidence she found credible and why. She explained how she made her Determination. I note that the Reasons and the Record indicate the Delegate did consider the ROE, and in any event, an ROE is not objective evidence that the Complainant quit as it is filled out by the employer. The last day of work question on the Branch's Complaint Form does not indicate whether the Complainant quit or was terminated.
39. SBFL says section 42 of the *ESA* allowed it to bank the Complainant's extra hours of work. However, Part 4 of the Act (except for section 39, which deals with excessive hours) does not apply to farm workers and so it did not apply to the Complainant's situation. The Delegate refers to this in her Reasons in relation to the question of whether the Complainant is entitled to overtime wages or regular wages. Even if section 42 had applied, it says an employer may establish a time bank at the written request of the employee. There was no evidence that the Complainant made such a request.
40. SBFL submitted an affidavit on appeal, but even if the appeal period deadline extension request were granted, the affidavit would not have been admissible as new evidence. New evidence is evidence that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c). The information in the affidavit could have been put before the Delegate with an exercise of due diligence: *Bruce Davies et al.*, BC EST # D171/03 at p. 3.

ORDER

41. Pursuant to sub-section 109(1)(b) of the *ESA*, I decline to extend the time for filing the appeal. Pursuant to section 115(1)(a) of the *ESA*, the Determination dated November 4, 2020, is confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal