Citation: Second Brother Mushroom Farm Ltd. (Re)
2022 BCEST 12

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Second Brother Mushroom Farm Ltd.
(the "appellant")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2021/094

DATE OF DECISION: February 7, 2022

DECISION

SUBMISSIONS

Tri Quach on behalf of Second Brother Mushroom Farm Ltd.

INTRODUCTION AND BACKGROUND FACTS

1. On August 10, 2021, the Director of Employment Standards (the "Director"), acting through the Employment Standards Branch's Agricultural Compliance Team, conducted a worksite audit at a worksite operated by the present appellant, Second Brother Mushroom Farm Ltd. (the "appellant"). This site audit was undertaken pursuant to section 76(2) of the *Employment Standards Act* (the "*ESA*"); this provision has now been repealed, but the Director's authority to conduct site investigations continues under section 73.1 of the *ESA*.

2. The Director subsequently issued a demand for employment records to the appellant and, with those records in hand, conducted a review to ensure that the appellant's employees were being paid in accordance with the provisions of the *ESA*. On September 24, 2021, the Director sent a "preliminary findings" letter to the appellant in which the Director advised the appellant that it appeared the appellant had not paid its employees in accordance with the *ESA*. Although invited to do so, the appellant did not respond to the Director's "preliminary findings" letter.

3. On October 18, 2021, Courtney Milburn, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination, and her accompanying "Reasons for the Determination" (the "delegate's reasons"), in which she held as follows:

- "[Section 27] wage statements must contain certain information, including the employees [*sic*] wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate commission or other incentive basis. I find the wage statements submitted by the [appellant] do not meet the requirements of section 27 of the Act."
- "Contrasting the hours of work records with the wage statements, I find the wage statements do not accurately reflect the actual hours worked. The records showing the hours worked by each employee are the same for all employees, irrespective of the hours worked or crops picked indicated on the daily logs."
- "All employees paid by the hour, including farm workers, must earn a minimum hourly rate of pay of $15.20 an hour plus 4% in vacation pay. If paid by piece rate, employees must be paid the minimum piece rate for the product picked, as provided by the Regulation. In this case, the Employees were picking mushrooms. As such, the minimum piece rate for mushrooms picked is $0.290 per pound or $0.629 per kilo…I find 12 of the 13 employees encompassed by this audit have not been paid the minimum wage as required in section 16 of the Act. Based on the [appellant]'s records, the employees who were paid by the hour were being paid less than $15.20/hour, and the employees paid by piece rate were receiving less than $0.290/pound of mushrooms picked. As such, the Employees did not receive all wages as required by the Act."

4. Accordingly, the delegate issued wage payment orders ranging from about $60 to about $4,700 for each of the twelve employees. The wage payment orders total $9,581.88, including vacation pay and section 88 interest.

5. Further, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98 of the *ESA*) based on the appellant's contravention of sections 16 (failure to pay at least minimum wage) and 27 (failure to provide compliant wage statements). The total amount payable under the Determination, including section 88 interest, is $10,581.88.

THE APPEAL

6. On October 26, 2021, the appellant filed an appeal of the Determination. The appeal is based on sections 112(1)(a) and (b) of the *ESA* (the delegate erred in law, and failed to observe the principles of natural justice). The appellant says that the Determination should be varied as it concerns two of the twelve employees.

7. One of these two employees, "THV", was awarded about $700, while the other employee, "HTV", was awarded about $67. The appellant seeks to have THV's wage award reduced to about $62, and with respect to HTV's wage award, the appellant says that it *overpaid* this employee by about $109. Both of these employees were paid an hourly, rather than a piece work, wage rate.

8. The appellant says that the delegate erred as follows:

> [The] Delegate of the Director of Employment Standards, erred in calculating the total hours for both employees for the periods in question by not accounting for time taken for lunch which is required by the Employment Standards act [*sic*] to provide 30 minutes after every 5 hours of consecutive work. Employees do not clock out when they take their lunch breaks, as evidenced by the timecards. Any employees that are expecting to work more than 5 hours will normally take their "lunch/breakfast" 30-minute breaks somewhere within the period they have clocked in and out for the day.
>
> In addition, the workers made manual adjustments to their cards when they either forgot to clock out for the day or mistakenly used someone else's timecards. Notes are provided in the attachments.
>
> … We feel that [the delegate], in her capacity as a compliance officer, either should have known and accounted for the lunch breaks or is unaware of the BC ESA requiring employers provide 30 minutes of unpaid lunch breaks.

FINDINGS AND ANALYSIS

9. The appellant's materials do not include any evidence or argument that supports its "natural justice" ground of appeal. The worksite investigation was conducted in accordance with the Director's powers under the *ESA*, and the appellant was given a reasonable opportunity to participate in that investigation, and to respond to the delegate' preliminary findings (consistent with the delegate's obligation under section 77 of the *ESA*).

10. Although the appellant did not expressly raise this ground of appeal on its Appeal Form, its appeal materials might also be characterized as raising the "new evidence" ground of appeal (see section 112(1)(c) of the *ESA*). However, fundamentally, this appeal is based on an assertion that the delegate made unreasonable findings of fact.

11. Section 32 of the *ESA* states that an employer must provide an employee with at least a 30-minute meal break after the employee has worked five consecutive hours. This meal break is presumptively unpaid time. However, if the employee either works, or is required to be "available" for work, the meal break must be *paid* time.

12. I am unable to determine, based on the material before me, whether either of these two employees' wage awards improperly accounted for a 30-minute meal break. In my view, the records the appellant attached to its Appeal Form do not unarguably support its position on appeal. Further, and in any event, I do not consider those documents to be admissible on this appeal.

13. In the delegate's September 24, 2021 "preliminary findings" letter, the delegate indicated that several employees were not being paid in accordance with the provisions of the *ESA* and the *Employment Standards Regulation*. With respect to the two employees whose wage awards are now being challenged, the delegate's preliminary conclusion regarding their entitlements was based *on the appellant's own time sheets* that it had submitted in response to the delegate's demand for employment records. The delegate noted, in her September 24th letter, the following:

> *Based on the payroll records provided*, it does not appear that employees are being paid for all hours worked or weight of crop picked. The hours set out on the wage statements appear inaccurate as they are the same for all employees irrespective of hours or crops indicated in the records.
>
> *Contrasting the hours indicated in the daily hours worked or the weight of crops picked, with the wages paid to each employee, it does not appear that employees are receiving minimum wage.* As of June 1, 2021, as set out in Section 15 of the Employment Standards Regulation ("the Regulation") the minimum wage is $15.20 an hour, and under Section 18, the piece rate for mushrooms is $0.290 per pound.
>
> (my *italics*)

14. The delegate specifically invited the appellant to respond if it believed there was an error in the time sheets that it had submitted. It should be stressed that the delegate also advised the appellant that its records could be used as the basis for any unpaid wage awards that the delegate might issue. The delegate, in her September 24th letter stated:

> My preliminary assessment is that the [appellant] may have contravened Sections 27, and 16 of the Act by failing to provide wage statements that include all the requisite information, *and by failing to pay minimum wages* as prescribed in Section 15 and 18 of the Regulation.
>
> Further, *it appears that wages are outstanding the 13 employees*.
>
> *Should you disagree with my preliminary assessment, please provide all argument and evidence, in writing, to support your position no later than 4:00 p.m. Friday October 1, 2021. If you fail to respond by the above date, a determination with applicable penalties may be issued, without further notice to you, based on the information currently on file.*

(my *italics*)

15. However, as is noted in the delegate's reasons, at page R2: "The [appellant] did not respond to the preliminary findings."

16. I do not think it appropriate for the appellant to now challenge the delegate's factual findings, given that they were based on the appellant's own records. I should also note that these records unequivocally show that both THV and HTV were not paid at least the minimum hourly wage to which they were entitled.

17. If the appellant had wished to make the point that the time sheets were inaccurate, it should have made that point when the delegate specifically invited it to do so. The delegate provided the appellant with both her e-mail address and her direct telephone number so that the appellant could directly communicate with her. The delegate's September 24th letter was provided to the appellant and to its legal counsel. As noted, neither the appellant, nor its legal counsel, provided any sort of response.

18. Accordingly, and apart from the fact that I am not satisfied, based on the material before me, that the delegate incorrectly calculated the wage entitlements for the two employees in question, I am also of the view that this appeal should be dismissed based on the long-standing "*Tri-West Tractor/Kaiser Stables*" principle (see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97). This principle holds that if a party fails or refuses to actively participate in an investigation when invited to do so, evidence and argument that could have been presented during the investigation will not be considered in an appeal to the Tribunal (see, for example, *Surdell Kennedy Taxi Ltd.*, 2021 BCEST 81).

19. To the extent that this appeal might be characterized as raising a "new evidence" ground of appeal, I remain of the view that it still stands as an appeal without any presumptive merit. "New evidence" is admissible on appeal if it was not *available* when the determination was being made. Apart from that requirement, the Tribunal has held that any "new evidence" must be material, credible, and highly probative (*Davies et al*., BC EST # D171/03). The party proffering the "new evidence" must also explain *why* the evidence was not available when the determination was being made and, thus, could not have been provided to the delegate.

20. The appellant's "new evidence" falls well short of meeting these criteria – first and foremost, this evidence *was* available, and could have been provided to the delegate had the appellant submitted a response to the delegate's "preliminary findings" letter (as it was expressly invited to do). The appellant has wholly failed to explain why this evidence was not provided to the delegate when it was asked to respond to her "preliminary findings" letter.

21. In my view, this appeal has no reasonable prospect of succeeding and, as such, must be dismissed pursuant to section 114(1)(f) of the *ESA*.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal