

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
("Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts
Shafik Bhalloo
Robert E. Groves

FILE No.: 2022/006

DATE OF DECISION: April 8, 2022

DECISION

SUBMISSIONS

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

OVERVIEW

1. This is an application by the Director of Employment Standards (Director) for a reconsideration of 2021 BCEST 103 (the "Original Decision"), issued by the Tribunal on December 21, 2021.
2. On March 11, 2021, an employee of Champ's Fresh Farms Inc. ("Champ's") filed a confidential complaint with the Employment Standards Branch alleging that Champ's had contravened the *Employment Standards Act* ("ESA") and *Employment Standards Regulation* ("Regulation") by failing to pay its employees the minimum piece rate on all mushrooms picked. The complaint triggered an investigation into Champ's payroll practices regarding its mushroom pickers.
3. During the investigation, Champ's informed the Director, and the Director found, that it paid its employees a range of piece rates for different grades of mushrooms which ranged from \$0.29 per pound and higher for most grades of mushrooms to lower than \$0.29 per pound for the least desirable and profitable categories of mushrooms. Champ's informed the Director that, when combined, the piece rates of the aggregate pounds picked by a worker averaged more than \$.29 per pound. However, if the average resulted in a piece rate below \$0.29 per pound, Champ's topped up the employees' wages to ensure that they would earn no less than \$0.29 per pound.
4. In the July 7, 2021, determination (the "Determination"), the Director found that Champ's remuneration system for its mushroom harvesters did not comply with the requirements of section 18(1) of the *Regulation* that farm workers employed on a piece work basis who hand harvested mushrooms must be paid a minimum of \$0.29 per pound of mushrooms harvested. The Director ordered Champ's to post \$200,000 security, finalize a self-audit and to pay its employees unpaid wages owing in accordance with the results of the audit. The Director also imposed two \$500 administrative penalties for Champ's contraventions of the *Regulation*.
5. Champ's appealed the Director's Determination. In the Original Decision, the Tribunal Member, Ken Thornicroft ("Member Thornicroft"), granted Champ's appeal, and cancelled the Director's directions and orders. Member Thornicroft confirmed the two \$500 administrative penalties.

BACKGROUND

The Determination

6. In the Determination, the Director found that while Champ's acknowledged that some grades of mushrooms were paid at a piece rate less than the minimum piece rate permitted by the *Regulation*, it

took the position that because the average piece rate earned by an employee in a pay period was more than the minimum \$0.29 per pound, it had complied with the legislation. The Determination stated:

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 that 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.

... 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. ...Champ's...cannot pay any pound of mushrooms at an amount less than the \$0.29 per pound minimum, regardless of the grade of product.

7. On appeal, Champ's argued that the Director erred in law by either misinterpreting or misapplying section 18(1)(h) of the *Regulation* and otherwise "mischaracterized or misapprehended relevant facts." Champ's argued that its piece rate payroll system fully complied with the *Regulation*. Specifically, Champ's contended that the Director's delegate erred in finding that employees were paid a piece rate less than the minimum piece rate permitted by the *Regulation* for some grades of mushrooms. Champ's argued that the piece rates paid at less than \$0.29 per pound were integrated with piece rates that exceeded the minimum piece rate, and that every employee earned \$0.29 per pound or more. Champ's outlined the basis for its variable piece rate payment, which it described as "incentivizing the right picking behaviour," and contended that, overall, it paid its 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" and "...regardless of the type of mushrooms picked, [workers' wages] are "topped up" so that they are paid 29 cents per pound in each pay period."
8. Champ's also argued that all per pound rates for mushrooms fixed a less than 29 cents per pound are notional, not actual rates, and that the delegate had erred in "selectively focus[ing] on only part of the [piece rate] System, thereby erring in law."

9. The Director contended that the system under review was not materially different from the Tribunal's decision in *All Seasons Mushrooms Inc.*, 2018 BCEST 97 ("*All Seasons*") which determined that a piece work system did not comply with section 18(1)(h) of the *Regulation*.
10. The Director also argued that Champ's averaging system undermined the policy goals implicit in section 18(2) of the *Regulation* which requires employers to prominently display a notice at the work site which outlines information regarding (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 contended that the objective of section 18(2) could not be achieved if the resulting piece rate is uncertain due to an after the fact 'averaging' calculation.
11. Member Thornicroft declined to follow the Tribunal's decision in *All Seasons*, noting that Champ's averaging or adjustment of the "grade list" was "somewhat different" than that followed by the employer in *All Seasons*.
12. Member Thornicroft found the delegate's observation that some grades of mushrooms were paid at a piece rate less than the minimum piece rate permitted by the *Regulation* to be 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... (emphasis in original) [para. 64]
13. Member Thornicroft also found the delegate's conclusion that when workers harvested mushrooms at a base rate lower than \$0.29 per pound, they were working for less than the minimum wage prescribed in section 18 of the *Regulation* to be in error:
- In my view, this fundamentally misstates the nature of Champ's piece work system... 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 [sic] picked only mushrooms rated at more than \$0.29 per pound, that worker would be paid based on the rates for each class of mushroom, and not the \$0.29 per pound minimum... 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." [para. 66]
-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. [para. 67]
14. Referring to section 18(1)(h), Member Thornicroft said as follows:
- Section 18(1) (h)... does not provide for differential per pound wage rates based on the quality or type of mushrooms being harvested. This minimum wage provision simply requires the employer to pay not less than \$0.29 per pound....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 class. However, the wage agreement clearly states 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." [para. 71]

15. Member Thornicroft continued as follows:

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 to 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 a result 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. [para. 72]

16. Finally, Member Thornicroft determined that the Tribunal Member in *All Seasons* (“Member Stevenson”) arrived at his decision based on an interpretation and application of section 18(2) of the *Regulation* rather than section 18(1)(h), which was the section the delegate had found that Champ's to be in contravention of. Member Thornicroft also noted that the averaging formula in *All Seasons* was undefined, unlike the formula utilized by Champ's (at para. 74), and that, in any event, he was not bound by *All Seasons*, which he found unpersuasive.

ARGUMENT

17. The Director contends that Member Thornicroft came to a different conclusion of law from Member Stevenson's decision in *All Seasons* on similar facts, and that this application provides the Tribunal with an opportunity to confirm the correct analytical approach under section 18 of the *Regulation*.
18. The Director argues that the issues raised in the reconsideration application have significant implications for future cases and for the wage payment system in general. The Director submits that the case raises important questions regarding the interpretation of what “minimum wage” means in general, and what it means specifically, in the context of section 18 of the *Regulation*.

19. Champ's argues that reconsideration of the Original Decision is not warranted since Member Thornicroft did not make any mistake in applying the law or misstate any facts. Champ's also argues that the Director's application is based solely on the Director's dissatisfaction with the outcome of the Original Decision.
20. In the alternative, Champ's contends that the Original Decision is correct, and that Member Thornicroft was right not to follow the Tribunal's earlier decision in *All Seasons*.
21. Although both parties also referred to a 2019 survey prepared for the Ministry of Labour, "Exploring the Economic Impact of the Piece Rate System in British Columbia", the Panel finds this study of no assistance in determining the issues in this application. Not only did the authors of the study expressly set out its limitations particularly with respect to workers in the mushroom sector, the Panel is tasked not with evaluating economic efficiencies but with the proper interpretation of the *ESA*.
22. Finally, Champ's submits that the wage payment scheme of mushroom pickers is analogous to the payment scheme for salespersons who are paid commissions. The commissions of salespersons who are guaranteed minimum wages are calculated only at the end of a pay period, and if the employee has not earned commissions equal to the minimum wage, the employer will increase the commissions to an amount equivalent to the minimum wage. Champ's argues that the Director's position that "wages are earned when work is performed and payable when they are earned" is not reflected by this payment scheme, which has been determined to be compliant with the *ESA*. Champ's argues that if the Director's interpretation was to be applied, employers would have to calculate the amount an employee earns each time an employee picks a mushroom, a result it contends is absurd.
23. The Director submits that Champ's analogy to a commissioned salesperson does not assist the Panel in an analysis of wages for piece rate workers.

ISSUES

24. The two issues before the Panel on this reconsideration application are:
1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

25. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides:
- (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

The Threshold Test

26. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
27. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
28. The Tribunal exercises the reconsideration power only in very exceptional circumstances, with a focus on the correctness of the decision being reconsidered.

Has the Applicant met the first stage of the Milan reconsideration test?

29. The Panel is of the view that this is an appropriate case for the exercise of the reconsideration power. The application raises a question of law that has significant implications for future cases.
30. One of the purposes of the *ESA* is to provide “fair and efficient procedures for resolving disputes over the interpretation of... its provisions.” The reconsideration application offers the Tribunal the opportunity to clarify the proper interpretive approach to the minimum wage provisions contained in 18(1) of the *Regulation*. In addition, there are now conflicting decisions of the Tribunal in two different cases on similar facts which may lead to industry uncertainty regarding the proper approach to or application to this provision.

Legislative Framework

31. Section 16(1) of the *ESA* requires employers to pay employees at least the minimum wage as prescribed in the *Regulation*. Section 18(1) of the *Regulation* sets out the minimum wage for farm workers who are paid on a piece work basis and hand harvest certain crops. For workers who pick mushrooms, the minimum wage is \$0.29 a pound or \$0.639 a kilogram (18(1)(h)).
32. Additionally, section 18(2) provides that 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

33. The issue before us is whether the legislative regime allows an employer to calculate the minimum wage for farm workers employed on a piece work basis on a daily, weekly, or pay-period basis.
34. It is the Panel's view that the Tribunal's reasoning in *All Seasons* most closely reflects the intention of the legislature; that is, the minimum wage provision for farm workers employed on a piece work basis is based on a unit of volume or weight picked (in this case, the unit is weight). That unit represents the performance of work for which the worker is entitled to a wage, and farm workers employed on a piece rate are entitled to the minimum wage for each unit completed. In our view, nothing in section 18(1) of the *Regulation* enables an employer to pay employees on a daily, weekly, or pay-period basis using a formula which deviates from the piece rate prescribed in section 18(1) of the *Regulation*.
35. The Panel agrees that the methodology employed by Champ's, that is, the "averaging" of pounds picked based on a formula using "notional" values, does not meet the requirements of section 18(1)(h). As found by the Tribunal in *All Seasons*, "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" and
- 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.
36. Member Thornicroft distinguished *All Seasons* in part because Member Stevenson was sceptical that the workers in *All Seasons* were aware of the "averaging" formula (see *Original Decision, para 73*). Member Thornicroft found that where the employment contract expressly referred to the averaging formula, it was both no longer opaque, but it was "sensible" since it enabled workers to "adjust their work habits in order to harvest the highest valued mushrooms."
37. The Panel finds that Champ's contract averaging formula, whether or not the workers consented to it, does not comply with the requirements of section 18(2). It is impossible for an employer to comply with section 18(2) using this formula. An employer's obligations under subsection 18(2) are not just *conjunctive* but also *mandatory*; the employer "must display" this information in a location all employees can read. If premium mushrooms have a fluctuating rate based on "averaging", it matters not whether or not the piece work system is opaque or transparent to workers, it is impossible for the employer to post the "piece rate" in accordance with subsection 18(2).
38. Section 18(1) cannot be read independently of section 18(2). It is true that Champ's employees will never get less than the minimum of \$0.29 a pound for any mushrooms they pick because, as Member Thornicroft pointed out:
- ...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 on 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'.
39. However, an employer's obligation under section 18(2) (c) is to provide employees advance notice of "the resulting piece rate" of any products they pick listed in section 18(1). The language of section 18(2)(c)

does not enable employers to display notices setting out conditional or “notional rates” of the product to be picked that may be later adjusted up or down based on the quality of product they pick. To interpret this provision otherwise would render the requirements of section 18(2)(c) meaningless since the notional rate for the higher quality, higher notional rate product would never be accurate and would always fluctuate where the employee also picks lower quality, lower notional rate product. The employer would be able to adjust the higher notional rates down to mitigate the below-minimum rate of the lower quality product picked at any subsequent time.

40. Champ’s payment system simply does not allow any employee to know, in advance, the “resulting piece rate” they will get for any higher category mushrooms with higher notional rates if they also pick low quality mushrooms with below minimum notional rate.
41. The Tribunal must apply the legislation as it is written, not as it may wish it to be, or what it believes might “make better sense”. As a Reconsideration Panel of this Tribunal stated, “Principles of statutory interpretation are not licence for [a] Tribunal to ignore the plain meaning of the words of a statute and substitute its view of legislative intent based solely on that body’s judgement about what is ‘fair’, ‘logical’ or ‘rational’, or what it ‘should be.’” (*Re Mattson*, Reconsideration Decision BC EST #RD647/01).
42. While Champ’s piece rate system may be critical to its profitability or necessary for “incentivizing” and rewarding harvesting behavior among its employees, the Panel finds that this system does not comply with the mandatory requirements of the section 18(2) of the *Regulation*.
43. Absent legislative amendments, an employer has no discretion or any flexibility to avoid this requirement, even if the employer effectively complies with the minimum piece rate payment under its averaging formula. If the legislature wanted to allow a flexible averaging system using notional values, in the Panel’s view, the legislature would have done so expressly.
44. While Champ’s contracts of employment assure its employees that their wages will never be below the minimum wage prescribed in the *ESA*, the fact that the wage is conditional contravenes section 18(2) (c) of the *Regulation*.
45. The Panel further finds that the legislative regime regarding the payment of wages to commission salespeople is not analogous to the payment of wages to piece rate workers. As the Director correctly notes, neither the *ESA* nor the *Regulation* provide for mandatory minimum rates for commission salespersons. Additionally, as the Director notes, the only minimum wage protection for employees employed in mushroom picking, which the Panel accepts is a vulnerable category of workers, is contained in section 18 of the *Regulation*.

ORDER

46. The application for reconsideration is allowed. The Panel cancels the Original Decision and confirms the Director's July 7, 2021, Determination.

Carol L. Roberts
Panel Chair
Employment Standards Tribunal

Shafik Bhalloo
Member
Employment Standards Tribunal

Robert E. Groves
Member
Employment Standards Tribunal