

An appeal

- by -

0752871 B.C. Ltd.  
(the “Employer”)

- 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)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2014A/40

**DATE OF DECISION:** June 24, 2014

## DECISION

### SUBMISSIONS

Sarjinder Dhaliwal

on behalf of 0752871 B.C. Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0752871 B.C. Ltd. (the “Employer”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 28, 2014 (the “Determination”).
2. The Determination found that the Employer contravened Part 3, section 17 (wages) in respect of the employment of Krishan Kumar Arora (“Mr. Arora”), Parwinder Kaur Buttar (“Ms. Buttar”) and Jasvir Kaur Randhawa (“Ms. Randhawa”), and levied an administrative penalty against the Employer in the amount of \$500.00, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for the said contravention.
3. The Employer has appealed the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination, and seeks the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination.
4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”). At this stage, I am assessing this appeal based solely on the Reasons for the Determination (the “Reasons”), the appeal and written submissions of the Employer, and my review of the section 112(5) “record” that was before the Director when the Determination was being made. If the Employer’s appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite the Director to file Reply submissions on the appeal, and the Employer will be afforded an opportunity to make a final Reply to those submissions, if any.

### ISSUES

5. As indicated, the sole issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

### BACKGROUND AND FACTS

6. The Employer was issued a farm labour contractor (“FLC”) licence by the Employment Standards Branch (the “Branch”) on December 28, 2011, which was set to expire on December 27, 2014.
7. On October 7, 2013, Sarjinder K. Dhaliwal (“Ms. Dhaliwal”), a director of the Employer, notified the Branch that the Employer would no longer be operating as a FLC.
8. On November 19, 2013, a delegate of the Director issued the Employer a Demand for Employer Records (the “Demand”) pursuant to section 85(1)(f) of the *Act* with a view to ensuring that the Employer was in compliance with the *Act* and the *Regulation*. The Demand required the Employer to produce and deliver all daily logs, payroll records, cancelled cheques and direct deposit summaries for the period January 1, 2013, to

September 30, 2013, to the Branch on or before December 2, 2013. The Employer complied with the Demand by delivering all payroll records and cancelled cheques required in the Demand.

9. After reviewing the payroll records of the Employer, the delegate issued his preliminary investigation findings in a letter dated January 22, 2014 (the “First Letter”), which he sent to the Employer to the attention of Ms. Dhaliwal. I note the First Letter did not make it in the initial production of the Director’s record in this appeal, but was disclosed by the Employer and subsequently by the Director when the Employer challenged the completeness of the record.
10. In the First Letter, the delegate delineated names of ten (10) employees who, according to the delegate, had outstanding wages owed to them and were not paid pursuant to section 17 of the *Act*. Section 17 requires “wages” to be paid at least twice each month and within eight (8) days from the end of each “pay period”.
11. The delegate afforded the Employer an opportunity to respond to his findings in the First Letter by February 5, 2014, if the Employer disagreed with any findings. Ms. Dhaliwal appears to have responded to the First Letter in her undated fax to the delegate, which appears to be missing from the “record” also, but the Employer has included it in the appeal. In her response, Ms. Dhaliwal requested the delegate to return to her the Employer’s original payroll documents so that the Employer could respond. Ms. Dhaliwal also noted, in her response:

...I would like to point out an obvious error on your report, our pay period ends on the 15<sup>th</sup> and the end of the month, your report seems to indicate the pay period ending to be our the pay date [sic]. Any reasonable person would have realized what the period ending date is when reviewing the dates the wages are paid. You can review your findings and adjust them according to a possible error in what you understood to be the period ending date.

12. Subsequently, on January 28, 2014, the delegate issued a revised investigation letter to the Employer to the attention of Ms. Dhaliwal (the “Second Letter”). In the Second Letter, the delegate, presumably considered Ms. Dhaliwal’s reply to the First Letter, and listed only three (3) employees - Mr. Kumar, Ms. Buttar, and Ms. Randhawa - as employees who had outstanding wages owed to them by the Employer and with respect to whom the Employer breached section 17 of the *Act*. As with the First Letter, in the Second Letter, the delegate provided the Employer an opportunity to respond to the delegate’s findings, if the Employer disagreed with them.
13. On February 10, 2014, Lucky Gill-Chattha (“Ms. Gill-Chattha”) of Done Rite Bookkeeping, on behalf of the Employer, sent a response to the Second Letter, stating:

Further to your letter dated January 28, 2014, copy enclosed, we reply as follows:

- Krishan Arora requested not be paid [sic] for that period, copy of letter enclosed, albeit we have enclosed a cheque payable to him for the full amount, copy enclosed.
  - Jasvir Kaur Randhawa requested not be paid [sic] for that period, albeit we have enclosed a cheque payable to her for the full amount, copy enclosed.
  - Parwinder Buttar was paid the following period. Please find enclosed the detailed employee detail and look under adjustment and it shows that the following payroll we paid her, it appears we have overpaid her [sic].
14. After receiving Ms. Gill-Chattha’s reply, on February 28, 2014, the delegate issued the Determination holding that the Employer breached section 17 of the *Act* in respect of the employment of Mr. Arora, Ms. Buttar, and

Ms. Randhawa. In the Reasons, the delegate explains his justification for the Determination stating as follows:

According to the records provided, 0752871 B.C. Ltd. has failed to pay all wages to Krishan Kumar Arora, Parwinder Kaur Buttar, and Jasvir Kaur Randhawa. 0752871 B.C. Ltd. it [sic] has issued cheques to Krishan Kumar Arora and Jasvir Kaur Randhawa for their outstanding hours. 0752871 B.C. Ltd. admits to not paying all wages owed to Parwinder Kaur Buttar in the corresponding pay period and as a result, they had to make adjustments in the following pay periods to pay for the outstanding hours.

Section 40.1 of the Regulation excludes farm workers who hand harvest crops from section 17 on the condition that the employer pays the farm workers an advance of at least 80% of wages earned in the first pay period of the month, and monthly, all wages earned in the month less the wages previously paid. However, 0752871 B.C. Ltd. has not met this requirement and therefore section 17 applies in this case.

0752871 B.C. Ltd. [sic] payroll records clearly indicate that the aforementioned employees were not paid all wages earned by them in a pay period. 0752871 B.C. Ltd. has not denied this fact; it has just provided an explanation for why the employees were not paid in accordance with section 17 of the Act. I find that 0752871 B.C. Ltd. has contravened section 17 of the Act by failing to pay the aforementioned employees all the wages earned in a pay period.

## SUBMISSIONS OF THE EMPLOYER

15. Ms. Dhaliwal presented written submissions on behalf of the Employer. The substance of the submissions are set out in three (3) paragraphs, and I propose to set them out *verbatim* below:

An audit of our records was performed in January for the last six months of our operations which ended in June of 2013. The first request for sent to us [sic] on January 22, 2014 to respond to various issues found with our payroll records which is attached in its entirety. We know our payroll records are pretty precise given the fact that we use electronic means to check in our employees and this information is uploaded directly into our payroll without any human intervention. Accordingly, we responded by fax asking the delegate to provide back up for the findings. We realized that the delegate auditing our records had no real accounting knowledge no [sic] any auditing knowledge. As well, it became very apparent that his work was not being reviewed let alone supervised. Subsequently we learned that he was a co-op student with no real work experience.

Subsequently, on January 28, 2014 another letter was issued stating that we did not have as many errors as outlined on the January 22, 2014 letter but rather four errors. Two of them related to work that was done by employees on my late father's garden and it should not have been reflected in the payroll records as it was not related to 0752871 BC Ltd [sic] and as such did not appear in our electronic records and did not get paid. They did not render the services to 0752871 BC Ltd [sic] but to my father. However, 0752871 BC Ltd. paid them in February 2014 anyway. The other two errors relate to one woman who did not check in properly for those days on our check-in/check-out system. We picked up the errors and paid her in the immediate subsequent payroll, in fact double paid her for one missed day. In total, the maximum amount not paid was less than \$100.00 and in fact it did not belong to 0752871 BC Ltd.'s business.

It appears that the Employment Standards branch [sic] is allowed to make grievous mistakes but an employer is not entitled to make any. We realize that our payroll records had an error and we rectified that once we realized the error had been made. The objective of Employment Standards to ensure that employers treat their employees with respect and pay them what they are entitled to [sic]. We did that and we made one mistake and rectified immediately when we became aware of it. We have met the spirit of legislation and no time [sic] was there any indication that we had plans to not pay our employees their full entitlement.

16. I also note that Ms. Dhaliwal sent the Tribunal a letter dated May 13, 2014, challenging the completeness of the “record” adduced by the Director in the appeal. In her letter, she notes that the “record” is missing the First Letter. She suggests that this is an important piece and looking at it together with the Second Letter that was subsequently issued by the delegate “indicates that the audit was conducted without any due regard [*sic*] to the documents given and the findings were far-fetched and clearly not reviewed by anyone with any business or accounting knowledge or normal thought”.
17. She also argues that the First Letter “was omitted [from the record] because the Delegate did not want to show that the office [Branch] was incompetent and negligent in their duties and the onus fell on the [*sic*] 0752871 BC to prove otherwise.”
18. Ms. Dhaliwal also argues that *no* Demand for Payroll Records was served on the Employer “from November 19, 2013” and that the Employer provided the payroll records to the delegate as a result of a demand made by the delegate in October. She also argues that the delegate is wrong in terms of when the Employer produced its payroll records.
19. She concludes the May 13 letter with the following submissions that do not relate to the Employer’s challenge of the record:
  4. The delegate did not revise our payroll records, as indicated in the letter dated January 28, 2014. Please read the first line on the last paragraph beginning on Page 1 of the letter dated January 28, 2014. If in fact they revised our records, then the fundamental principles of auditing have been violated and thus the audit is invalid.
  5. Buttar, Parwinder Kaur was clearly paid the 5.5 and 4.5 hours, albeit in a subsequent payperiod [*sic*]. In fact, she was paid 13.5 hours more than she was entitled to because of our attempt to correct the error. If the Delegate is able to be negligent to the point of incompetence as outlined in point 1 above, it ought to be reasonable that an employer can make an error as long as it is corrected in a subsequent period which it was. The intent of Labour Standards Board is to ensure that employees are paid fairly. Our employees were at all times treated with the greatest respect and paid fairly.

## ANALYSIS

### *(i) Challenge to the Completeness of the Director’s “record”*

20. As indicated previously, the First Letter was missing from the Director’s initial submission of the “record” in this appeal. The First Letter contained the delegate’s investigation findings and preliminary conclusions, which was presented to the Employer, and the Employer was afforded an opportunity to dispute same in writing, and the latter did so. It would appear that as a result of the Employer’s response to the First Letter, the Second Letter was issued, setting out the delegate’s revised investigatory conclusions before the Determination was made. While Ms. Dhaliwal submits that the First Letter was “omitted” from the Director’s “record” because the “delegate did not want to show that the office was incompetent and negligent in their duties”, I am unable to reach that conclusion here. More particularly, I am unable to find any evidence to conclude that there was an intention on the part of the delegate to conceal the First Letter. At most, this appears to be a case of the delegate being inattentive or careless in preparing the record and failing to submit the First Letter. The delegate also appears to have missed including in the “record” Ms. Dhaliwal’s response to the First Letter. However, both these documents were produced by the Employer in the appeal and I have considered them in this appeal but I reiterate that I am unable to conclude any ill motivation or impropriety on the part of the delegate in failing to include them in the initial submission of the “record”.

21. With respect to Ms. Dhaliwal's submissions disputing the Demand was sent to the Employer on November 19, 2013, and further disputing the delegate's description in the Reasons regarding the date when payroll records of the Employer were received by the Branch, I do not think anything of substance or relevance turns on this. The payroll records were indeed produced by the Employer in a timely fashion, whether in October or subsequently. Whether these records were the result of the Demand being made on November 19, 2013, or another time is immaterial to the issue under appeal. Having said this, I note that the Director, in response to the Employer's submissions that no Demand was made on November 19, 2013, has produced the Demand dated November 19, 2013, together with Canada Post's record confirming the Demand was sent by registered mail to two (2) addresses, including the one the Employer uses in the Appeal Form. At the latter address it was not claimed and at the other address the Canada Post record indicates it was refused by the recipient. However, as indicated before, nothing turns on this in this appeal as the payroll records were ultimately produced in a timely fashion and there is no issue of any wrongful administrative penalty levied in relation to the Demand and as there was no penalty levied in relation to the Demand.

*(ii) Substantive Merits of the Appeal*

22. In the appeal form, the Employer has checked off the "natural justice" ground of appeal. Natural justice is an administrative law concept referring to procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision maker (see *Re: 607730 B.C. Ltd. c.o.b. English Inn & Resort*, BC EST # D055/05).
23. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal elaborated on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigation into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party; see *BWT Business World Incorporated*, BC EST #D050/96.
24. The onus is on the Employer in this case to show that the Director breached the principles of natural justice in making the Determination. I do not find anything in the submissions of the Employer or the Director's "record" that supports the natural justice ground of appeal. In my view, the "record" amply illustrates that the delegate provided the Employer an opportunity to respond to his investigation findings in the First Letter, as well as to the Second Letter, and the Employer, through its representatives, responded to both letters and the delegate appears to have considered the Employer's submissions in both instances in making the Determination.
25. I note that in the Employer's appeal submissions, Ms. Dhaliwal challenges the delegate's experience and ability to review the Employer's payroll records and accuses the delegate for violating "the fundamental principles of auditing" in reviewing these records. In addition to leveling personal attacks at the delegate, she also calls the Branch "incompetent and negligent in their duties". Based on my review of the evidence and the "record" in this case, I do not share Ms. Dhaliwal's view of either the delegate or the Branch. I find Ms. Dhaliwal's attack against the delegate and the Branch without merit.

26. As indicated previously, the delegate, in the First Letter, set out his investigation findings, which were not final or conclusive in any sense, particularly when the Employer was invited to and did respond to the delegate's findings in the First Letter. This then led to the delegate issuing the Second Letter in which he modified his preliminary findings in the First Letter. In the normal course an investigation contemplates such a process. The preliminary findings of the delegate are always open for modification because the delegate normally affords the affected parties an opportunity to respond to the preliminary finding. That is precisely what happened in this case. Not infrequently, affected parties will dispute preliminary findings and adduce arguments and evidence in support to persuade the delegate to arrive at a different conclusion. In the case at hand the delegate appears to have been persuaded, in part at least, by the reply submissions of the Employer when he modified or amended his preliminary findings when issuing the Second Letter. However, this does not mean the delegate or the Branch was negligent in the conduct of the investigation as Ms. Dhaliwal alleges or that the conduct of the delegate in such case constituted a breach of natural justice. In the result, I do not find the Employer to have sufficiently proven its case that the delegate breached the principles of natural justice and therefore, I dismiss that ground of appeal.
27. I also note that Ms. Dhaliwal has adduced evidence that was not before the delegate when the Determination was made. In particular, she states that two (2) of the three (3) employees were not employees of the Employer, but worked on her late father's garden. These employees "did not render services to [the Employer]" but to her late father. Notwithstanding, she states the Employer paid them "in February 2014 anyway". With respect to the last employee, she states that "two (2) errors relate to one (1) woman who did not check-in properly for those days on our check-in/check-out system", and the Employer "picked up the errors and paid her in the immediate subsequent payroll" and that payment was a double payment to her. Although this evidence appears to be the sort of evidence that existed when the delegate was investigating the matter, the Employer did not produce it then and Ms. Dhaliwal does not offer any explanation that would excuse this failure.
28. The test this Tribunal follows in determining whether evidence qualifies as "new evidence" and may be considered on appeal is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In this case, the Tribunal set out the following four (4) conjunctive requirements that must be met before new evidence will be considered:
- a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made;
  - b) the evidence must be relevant to a material issue arising from the complaint;
  - c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - d) the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
29. In the case at hand, the "new evidence" Ms. Dhaliwal has adduced on behalf of the Employer does not qualify as "new evidence" and cannot be considered in this appeal because it fails the first of the four (4) conditions for admitting new evidence set out in *Re: Merilus Technologies, supra*. As indicated previously, the evidence Ms. Dhaliwal produces is evidence that was available before the Determination was made and, indeed, should have been adduced by the Employer during the investigation and not subsequently in the appeal of the Determination. This is a case of an employer "lying in the weeds" during the investigation stage and not presenting all of the evidence it should have presented before the Determination was made. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the

investigation stage and before the determination was made. (See *607470 B.C. Ltd. c.o.b. Michael Allen Painting*, BC EST # D096/07; *Huggies Buggies Daycare Inc.*, BC EST # D012/14)

30. While the Employer has not raised the error of law ground of appeal, I have considered it in context of the Employer's appeal, but did not find anything in the Reasons that would lead me to conclude that any of the following instances of error of law described in the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 exist in this case:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];;
  2. a miscalculation of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
31. To the contrary, I find the delegate's conclusion in the Determination that the Employer breached section 17 of the *Act* in respect of the employment of Mr. Arora, Ms. Buttar, and Ms. Randhawa to be amply supported by the factual evidence that was before the delegate during the investigation stage and before the Determination was made. Therefore, I find that there is no reasonable prospect that the Employer's appeal will succeed.

## ORDER

32. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal of 0752871 BC Ltd. on the grounds that there is no reasonable prospect that it will succeed. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated February 28, 2014, is confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**