

An appeal

- by -

Gian Kaur Dhaliwal carrying on business as Orchard Hill Estate Cidery
(“Orchard Hill”)

- 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: Carol L. Roberts

FILE No.: 2017A/44

DATE OF DECISION: May 30, 2017

DECISION

SUBMISSIONS

Jasmeen Dhaliwal and Gian Dhaliwal on behalf of Orchard Hill Estate Cidery

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Gian Kaur Dhaliwal carrying on business as Orchard Hill Estate Cidery (“Orchard Hill”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on March 3, 2017. In that Determination, the Director found that Orchard Hill had contravened sections 17, 21 and 28 of the *Act* in failing to pay wages to four employees in the total amount of \$ \$913.12. The total wages, plus interest, determined owing was \$927.20. The Director also imposed three administrative penalties in the total amount of \$1,500 for the contraventions, for a total amount owing of \$2,427.20.
2. Orchard Hill appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination. Orchard Hill also contends that evidence has become available that was not available at the time the Determination was being made.
3. This decision is based on Orchard Hill’s submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. On July 29, 2016, the Employment Standards Branch Agricultural Compliance Team (the “team”) conducted an inspection at the Orchard Hill fruit stand in Oliver to ensure compliance with the *Act* and the *Employment Standards Regulation* (the “*Regulation*”). The team interviewed Gian Dhaliwal (the “Employer” or “Orchard Hill”) who identified herself as the owner of Orchard Hill. She informed the team that she had three regular employees and several temporary employees. On that day, one employee was picking apples in an apple orchard and 20 employees were picking cherries in a cherry orchard in Cawston, B.C. The team informed Gian Dhaliwal that it was going to audit the workers’ payroll records and on October 4, 2016, a delegate of the Director issued a Demand for Employer Records for the farm workers who were picking in the orchards on July 29, 2016.
5. Orchard Hill produced crop picking summary sheets and payroll deduction online calculator (“PDOC”) slips for 27 employees, as well as a seasonal agricultural worker program contract for one of those employees and a signed employment contract for another, who was a temporary foreign worker. Orchard Hill stated that all but three employees were paid monthly and that all employees agreed to that payment frequency.
6. After a review of the records, the delegate observed that three employees who were temporary foreign workers or seasonal agricultural workers were paid bi-weekly, but that the others were not paid at least twice per month. The records also demonstrated that not all employees were paid monthly, with many pay periods exceeding 16 days. The delegate noted that Orchard Hill did not always pay the employees within eight days after the end of a pay period.
7. The delegate discovered that Orchard Hill deducted rent and insurance from the wages of the two temporary foreign workers and the seasonal agricultural worker, as authorized by their contracts, as well as amounts for

a “phone bill”. Orchard Hill also deducted amounts from another worker for an “electric bill.” Orchard Hill’s representative, Jasmeen Dhaliwal (“Ms. Dhaliwal”), informed the delegate that it did not have written authorization to make those deductions, but deductions from the wages for those bills were recorded on the workers’ picking summary sheets and each employee signed the sheet prior to being paid, suggesting they agreed to the deductions from their wages. However, the three foreign workers did not sign their PDOC’s and no summary sheets were provided for those workers.

8. The delegate determined that Orchard Hill had contravened section 17 of the *Act* in failing to pay employees all wages earned at least semi-monthly and within 8 days after the end of a pay period. The delegate determined that even if some employees may have verbally agreed to be paid less than semi-monthly, section 4 of the *Act* established minimum standards that the parties could not contract out of. The delegate determined that Orchard Hill had contravened section 17 multiple times and imposed an administrative penalty of \$500.00.
9. The delegate also determined that Orchard Hill had contravened section 21 of the *Act* in making unauthorized deductions from the wages of three employees. The delegate noted that Orchard Hill did not have written authorization from three foreign workers to deduct wages for a phone bill and determined that signing a picking summary sheet prior to being paid did not satisfy the *Act*’s section 22 requirements for wage assignments. The delegate further noted that Orchard Hill agreed that it did not have written consent from the employees to make deductions from wages for telephone and electric bills and found that those deductions were unauthorized. The delegate concluded that Orchard Hill contravened section 21 of the *Act* multiple times and imposed a \$500 administrative penalty for the section 21 contraventions.
10. Finally, the delegate determined that paying workers by piece rate, as Orchard Hill did, did not exempt employers from keeping a record of daily hours worked by each employee, even those who were considered temporary. The delegate also noted that the employer also did not keep records of the residential addresses of those foreign workers, who had since left Canada. The delegate concluded that Orchard Hill contravened section 28 of the *Act* in failing to keep a record of hours worked and imposed a \$500 administrative penalty.

ARGUMENT

11. Orchard Hill asserted that workers were paid according to the standards of the industry, which was by piece rate, and that workers received cash advances. Orchard Hill argues that it is a well-known standard of the industry that final payment for work is made once the harvest is completed.
12. Orchard Hill also says that, at the time wages were to be paid, one of the temporary cherry pickers left abruptly without giving notice and provided no contact information. Ms. Dhaliwal says that she informed the colleagues of this employee that he was to come by the office to receive his pay. She says that the worker came by ten days later, they reviewed the records together and Orchard Hill issued a cheque immediately. She says that the delay in payment was not caused by any action by Orchard Hill.
13. Ms. Dhaliwal says that industry standards is such that records for piece rates are created daily, including the last day of each harvest, and that Orchard Hill ensures that its records for the piece rate correspond with the workers’ records. She submits it is neither practical nor ethical to pay hourly or weekly salaries, and that many of the workers are highly mobile, making it difficult for Orchard Hill to reach them to ensure they are paid. She submits that all the workers know Orchard Hill’s location and contact information, and that temporary workers are issued advances throughout the harvest.

14. Orchard Hill also submits that it had verbal agreements in place with all employees for the deductions for telephone and electricity bills. Ms. Dhaliwal says that she was not aware written authorization was required for deductions. In her appeal submission, Ms. Dhaliwal included signed consent forms from the employees from whom deductions were made.
15. Ms. Dhaliwal argues that Orchard Hill complied fully with the Demand for Employer Records, submitting payroll records and contracts to the delegate in a timely fashion. She argues that the administrative penalty imposed for failing to provide dates of birth, occupation and telephone numbers of temporary foreign workers as well as dates their employment began is not fair because those records were never requested. She also says that, for the three foreign workers employed permanently by Orchard Hill, she was not supplied with their home addresses as the communications with them are in care of their respective consulates.
16. Ms. Dhaliwal also contends that the delegate's comments that paying by piece rate does not exempt employers from keeping a record of daily hours and that no records of hours worked for employees paid by piece rate were kept, are erroneous. She says those records were maintained and submitted to the delegate.

ISSUES

17. Did the delegate failed to observe the principles of natural justice in concluding that Orchard Hill had contravened sections 17, 21 and 28 of the *Act*?
18. Is there new and relevant information that would, if presented during the investigation, have led the delegate to a different conclusion on a material issue?

ANALYSIS

19. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of Section 112(2) have not been met.
20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
21. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.

22. Orchard Hill's appeal document does not describe how it was denied natural justice. In essence, the appeal is that the delegate was wrong in his conclusions. In *J.C. Creations Ltd. o/a Heavenly Bodies Sport* (BC EST # RD317/03), the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" of the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."

23. As Orchard Hill is self-represented, I have given it wide latitude in addressing the stated grounds of appeal.

Failure to observe the principles of natural justice

24. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes that Orchard Hill was denied natural justice. Orchard Hill was informed that records would be sought. The Director subsequently formally requested records an employer is obliged to maintain under the *Act* and Ms. Dhaliwal was given full opportunity to respond to the delegate's questions.

25. I am not persuaded that Orchard Hill was denied natural justice.

Error of law

26. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication 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.

27. The delegate considered the documents submitted in response to the Demand for Employer Records. After reviewing those documents, the delegate determined that deductions from employees' wages had been made contrary to section 21 of the *Act*. In the appeal submission, Ms. Dhaliwal acknowledged that she was unaware that she required written, as opposed to verbal, authorization to make deductions from wages, and submitted written authorizations with the appeal documents. The authorizations, dated in March 2017, were submitted as new evidence.

28. The Tribunal has established the following four-part test for admitting new evidence on appeal:

1. 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;
2. The evidence must be relevant to a material issue arising from the complaint;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. The evidence must have high 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. *Merilus Technologies* (BC EST # D171/03)
29. Not only do the authorizations not meet the test for new evidence as they were submitted well after the Determinations were issued, they would not have led the delegate to a different conclusion. At the time the deductions were made, Orchard Hill did not have written authorization from the employees to make the deductions. I find no error in the delegate's conclusion that Orchard Hill contravened section 21 of the *Act* in making unauthorized deductions from employees' wages for electrical and telephone bills.
30. Orchard Hill argues, in essence, that given the nature of the fruit picking industry, it is impossible to comply with the requirements of the *Act* to maintain full records of each employee, including home addresses, as well as to pay employees bi-weekly and at least 8 days after the end of the pay period.
31. I appreciate that the nature of the fruit picking industry is seasonal in nature and dependent on transient workers. The *Act* permits agricultural employees to be paid by piece rate. However, all employees, including farm workers, must be paid at least twice per month and all wages must be paid within eight days of the end of the pay period pursuant to section 17 of the *Act*. The *Act* does not establish different rules for the agricultural industry in this respect. Furthermore, section 28 requires employers to maintain employment records that include details including the date the employment began, the employee's name, telephone number and residential address, and the hours worked on each day regardless of how the employee is paid.
32. Employers must structure their business affairs in a manner that complies with the *Act*. The delegate correctly noted that employees and employers cannot contract out of the minimum standards of the *Act*, and failure to comply attracts the imposition of an administrative penalty. I find no error in the delegate's conclusions.
33. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed (see section 98(1) of the *Act*). Penalty assessments are mandatory – there is no discretion as to whether the penalty ought to be imposed. Furthermore, the amount of the penalty is fixed by *Regulation* (see section 29 of the *Regulation*).
34. While Orchard Hill appears to argue that the penalty assessment is unfair in the circumstances, the Tribunal cannot ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgment about what is "fair" or "logical". (*Douglas Mattson*, BC EST # RD647/01)
35. The Tribunal has also concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme." (*Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04)
36. Pursuant to section 114 of the *Act*, the appeal is dismissed. I am not persuaded that any grounds of appeal have been made out.

ORDER

37. Pursuant to section 115 of the *Act*, I Order that the Determination, dated March 3, 2017, be confirmed in the amount of \$2,427.20, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal