



An appeal

- by -

Pasteur Nsekerabanyanka  
(“Nsekerabanyanka”)

- 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:** David B. Stevenson

**FILE No.:** 2011A/24

**DATE OF DECISION:** June 28, 2011

## DECISION

### SUBMISSIONS

|                  |   |
|------------------|---|
| Ros Salvador     | counsel for Pasteur Nsekerabanyanka               |
| Pir Indar Sahota | counsel for Khaira Enterprises Ltd.               |
| Karpal Singh     | on behalf of the Director of Employment Standards |

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Pasteur Nsekerabanyanka (“Nsekerabanyanka”) of part of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 4, 2011. In its entirety, the Determination applied to fifty-eight former employees of Khaira Enterprises Ltd. (“Khaira”), including Nsekerabanyanka. The appeal only relates to that part of the Determination relating to the Director’s finding of the wages owing to Nsekerabanyanka, and this decision applies only to that part of the Determination.
2. In respect of the relevant part of the Determination, the Director found that Khaira had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay Nsekerabanyanka regular and overtime wages, compensation for length of service and vacation pay and ordered Khaira to pay Nsekerabanyanka an amount of \$12,467.67, an amount which also included interest under section 88 of the *Act*.
3. Counsel for Nsekerabanyanka says the Director erred in that part of the Determination applying to Nsekerabanyanka by not including the amount of an NSF cheque in the wages found to be owing to him by Khaira.
4. The Tribunal has discretion whether to hold an oral hearing on an appeal. The Tribunal has decided the issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

5. The issue in this appeal is whether the Director made a reviewable error in calculating the wages that had been paid to Nsekerabanyanka by Khaira.

### THE FACTS

6. The Determination indicates that Khaira does reforestation work throughout British Columbia, mostly through contracts from the BC Ministry of Forests. The work done by Khaira includes tree planting, brushing (clearing bushes and cut grass using hand tools around newly planted trees to allow growth) and other silviculture work. In 2010, up to mid-July, Khaira had contracts to do reforestation work on Texada Island and in Powell River, Kamloops, Salmon Arm, Revelstoke, and Golden.
7. Nsekerabanyanka was hired by Khaira as a foreman. He also did some tree planting and brushing. He was employed from March 17, 2010, to July 17, 2010, on Texada Island and in Powell River, Kamloops, Salmon Arm, Revelstoke, and Golden.

8. The Director found Nsekerabanyanka worked a total of 36 days in Kamloops and 4 days in Salmon Arm over three pay periods. He did tree planting on a piece rate of \$0.23 per tree for all days except from May 8 to 12, 2010, when he was at \$0.28 per tree. The Director found he earned a total of \$6,259.08 over this period.
9. The Director found he worked on Texada Island and in Powell River as a tree planter at a rate of \$16.00 an hour and worked a total of 207.0 regular and overtime hours. The Director found he worked in Revelstoke and Golden tree planting and brushing as a foreman at a rate of \$18.00 an hour and worked a total of 277.5 regular and overtime hours. The Director calculated he was entitled to be paid hourly wages in the amount of \$9,855.50 for this work.
10. The total wages the Director found were earned by Nsekerabanyanka was \$17,507.96, an amount which included length of service compensation in the amount of \$720.00 and vacation pay in the amount of \$673.38.
11. The Director found Nsekerabanyanka had been paid gross wages in the amount of \$5,940.58 and deducted that amount from gross wages earned to reach an amount of gross wages payable, to which interest under section 88 was added to reach an amount which represented the balance of wages owing. The Director's calculation of the gross wages paid is the matter in dispute in this appeal.

### **ARGUMENT AND ANALYSIS**

12. Counsel for Nsekerabanyanka says the Director incorrectly included an amount of \$1,487.25 as wages paid in calculating the balance of wages owing to him by Khaira. Counsel says this amount represents the amount of a cheque that had been received by the Director from Khaira, but not released because there were insufficient funds in Khaira's account to cover it.
13. Counsel for Khaira says Nsekerabanyanka earned a gross salary of \$6,287.25 and received that amount in four cheques issued by Khaira between April 8, 2010, and June 30, 2010, and a fifth cheque given to the Director. The submission by Khaira seems to have avoided addressing whether the cheque given to the Director for Nsekerabanyanka was ever passed on to him and cashed by him. That deficiency in their submission makes it unhelpful in addressing this appeal.
14. The Director agrees with counsel for Nsekerabanyanka that the amount of \$1,487.25 should have been deducted from the gross wages. Implicit in the Director's response is that the cheque was not passed to Nsekerabanyanka. The Director says it was an administrative error on his part that the amount was added to gross wages; it should not have been. He says the correct amount of gross wages paid to Nsekerabanyanka by Khaira should be calculated as \$4,453.33.
15. I find the Director has made a reviewable error in the Determination. There is sufficient information provided that I am able to vary the Determination and correct the error. Accordingly, the amount of \$1,487.25 will be taken from the amount of gross wages paid to Nsekerabanyanka and be added to the amount of wages owing to him.

**ORDER**

16. Pursuant to section 115 of the *Act*, that part of the Determination dated February 4, 2011, relating to the wage calculation for Nsekerabanyanka shall be varied to show the balance owing to be \$13,234.80, together with any interest that has accrued on that amount under section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**