

An appeal

- by -

Amrik and Surinder Nijjar carrying on business as Nijjar Farm
(“Nijjar”)

- 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.: 2011A/64

DATE OF DECISION: July 27, 2011

DECISION

SUBMISSIONS

Monica Neville, C.G.A

on behalf of Amrik and Surinder Nijjar carrying on business as Nijjar Farm

Ravi Sandhu

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Amrik and Surinder Nijjar carrying on business as Nijjar Farm (“Nijjar”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued April 8, 2011.
2. On July 23, 2010, the Employment Standards Branch Agricultural Compliance Team (“Team”) conducted a worksite visit at Nijjar Farm to ensure it was in compliance with the *Act* and the *Employment Standards Regulation*. At the time, Nijjar employees were hand-harvesting blueberries.
3. On January 17, 2011, the Director issued Nijjar a Demand for Records, including payroll records, cancelled cheques and bank statements. The records were produced as required.
4. Following a review of the records, the Director’s delegate determined that Nijjar had contravened section 28 of the *Act* in failing to maintain accurate and up-to-date records for all employees’ hours of work as well as section 17 of the *Act* in failing to pay employees semi-monthly and within 8 days after the end of the pay period. The Director imposed administrative penalties in the total amount of \$3,000 for the contraventions. The delegate imposed a \$500 penalty for the section 17 contravention and \$2,500 for section 28 contravention, given that this was Nijjar’s second contravention of that section within three years.
5. Nijjar says that the Director’s delegate failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled. Nijjar also sought a suspension of the Determination. Given that the Director agreed not to engage in any collection action prior to the Tribunal rendering a Decision, the Tribunal does not find it necessary to make an Order on the suspension issue.
6. This appeal is adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. The issue on appeal is whether the delegate failed to observe the principles of natural justice in concluding that Nijjar had contravened the *Act*.

FACTS AND ARGUMENT

8. After reviewing the payroll records and cross-referencing those records with site visit records, the delegate observed that there were three employees harvesting blueberries that had been interviewed by the Team but were not on Nijjar’s payroll.

9. The delegate also observed that there were five Nijjar employees who had not been paid semi-monthly and within 8 days of the end of each pay period.
10. The delegate informed Nijjar of his observations in writing and provided it with the opportunity to respond. Ms. Neville, Nijjar's accountant, asked the delegate to provide her with the site visit interview sheets in order to properly respond. Those were provided to Nijjar on March 17, 2011.
11. After reviewing the interview sheets, Nijjar questioned the accuracy of the Team's findings, stating that the majority of the people on the site visit were Nijjar employees. Ms. Neville said that Nijjar had no records of an employee named Surinder Nijjar and suggested that the person interviewed may have become confused and misunderstood the interviewer's questions. With respect to two remaining employees, Ms. Neville stated that Nijjar had no knowledge of or records for those individuals. Nijjar noted that there were three people on the farm with the surname "Dhaliwal" and suggested that the inspector had not recorded the correct first names. In a subsequent response, Ms. Neville asserted that the employee identified as Surinder K. Nijjar was the owner of the farm and was not therefore required to be on the payroll. Finally, Ms. Neville asserted that because the pickers were sporadic and casual workers working less than seven days, there was no requirement that they be on the payroll. She said that Nijjar had done the very best to collect the names of the casual pickers and maintain payroll records for them.
12. Ms. Neville acknowledged that some employees had not been paid semi-monthly and within 8 days of the end of each pay period, but noted that the employees had always been paid this way. She further contends that the Director had never raised this as an issue in an audit conducted last year and that it has never been raised as a problem by Employment Insurance, Workers Compensation or Canada Revenue Agency.
13. The delegate accepted that one of the individuals identified by Nijjar was in fact on the payroll record but denied that the Surinder K. Nijjar identified on the interview sheets was the same individual as the owner. The delegate asserted that there were three people working on the farm who were not on Nijjar's payroll.
14. The delegate noted that section 28 required an employer to keep records for each employee including the employee's name and date of birth, rate of pay and hours worked. The delegate found that because Nijjar was the only Farm Labour Contractor on site during the worksite visit on July 23, 2010, all workers at the farm were Nijjar employees. The delegate further noted that section 28 did not differentiate between casual or sporadic workers and that Nijjar was in contravention of this section for the three individuals for whom Nijjar produced no payroll records. The delegate found that this was the second time Nijjar had contravened this section in the past 3 years and imposed the increased penalty as provided for in the *Regulation*.
15. The delegate noted that Ms. Neville did not dispute the observation that Nijjar was in contravention of section 17.
16. On appeal, Nijjar submits that the on-site inspection was not carried out properly and therefore, that the farm inspection team's findings are inaccurate and unsubstantiated. Nijjar argues that the burden of establishing a breach is on the Branch, which I infer is the Director. Nijjar also contends that the penalties assessed for the section 17 breach ought to be \$500, which represents the penalty for a first time contravention, rather than the \$2,500 for a second contravention, on the basis that the breach ought to have been obvious to the Branch in 2009 and that Nijjar "followed all of the changes ordered by Labour Standards and believed that they were now in compliance with the *Act*."
17. Nijjar submits that the investigative team only collected the names of people on the farm who may or may not have been picking without any other supporting information to verify they were employees. Ms. Neville

says that Nijjar payroll records show that 19 employees were paid for harvesting on July 23, 2010, the day the team was on the farm. She notes however, that the team only recorded 17 employees on the farm that day. Ms. Neville alleges that the interviewers made numerous errors based on the fact that Nijjar's payroll records do not correspond to the inspection team's interview results:

The appellants was unable to identify who these people were that were interviewed but they had to be employees on the payroll as the payroll records show 19 employees and the team counted only 17 people on site including the 3 people who the appellants cannot identify.

As to which employee was identified by the name of Surinder K. Nijjar, the appellants do not know who this was as there is no record for this person or any record of payment. The inspector claims that this person was not the same person as the farm owner, Surinder K. Nijjar. The inspector did not interview the farm owner, Surinder K. Nijjar separately yet the inspector has represented that this is not the same person as the farm owner but that this person had the exact same name as the farm owner. The appellants represent that there were not two persons harvesting blueberries on the date of inspection with the exact same name.

As to the employee interviewed as Vazeed Dhaliwal, the appellants has no knowledge of who this is and has no record for this person on file. As such, she/he was appropriately not included on the payroll. ... it is difficult to determine which one of the pickers on the payroll this might have been or if it was someone visiting.[reproduced as written]

18. Nijjar contends that the section 17 penalty should be set aside on the grounds that the Director "had a duty to inform the appellants of all contraventions on the previous inspection of the farm and the farm payroll records in 2009". Ms. Neville says that the Branch had the payroll records, bank statements and all cancelled cheques for that year and contends that because Nijjar was never told it was in contravention of that section at the time, it had no reason to make any change to the way in which the employees were paid in 2010.
19. The delegate submits that Nijjar is simply repeating the arguments on appeal that it made during the investigation. The delegate submits that Nijjar has not established an error of law or a breach of natural justice and has not presented any new evidence. The delegate asked that the appeal be denied.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
21. The burden of establishing the grounds for an appeal rests with an Appellant.
22. Although Nijjar does not describe how it was denied natural justice, in *JC Creations* (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. The Director's submissions are perfunctory, stating only that the arguments raised by Nijjar had already been addressed in the Determination. In my view, the delegate has not satisfactorily addressed Nijjar's submissions

in its submissions. Nevertheless, having reviewed the record, I find that Nijjar has not discharged its burden of demonstrating a breach of natural justice.

24. Section 28 requires an employer to keep records for each employee that includes the employee's name, date of birth, occupation, telephone number and residential address, the date employment began, the employee's wage rate, whether paid hourly, and the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis.
25. The record shows that there were a number of discrepancies between the names of the workers at the farm and Nijjar's payroll records. Nijjar asked for, and was given, the inspection sheets in order to make a full response to the delegate's observations. The sheets contain the names and where available or known, the addresses and phone numbers of the employees.
26. Ms. Neville's inability to locate a named individual on the payroll does not establish that the investigation team's records are inaccurate or unreliable. I accept that because Nijjar was the only employer on site the day of the inspection, all the pickers were Nijjar employees, whether they were casual, sporadic or otherwise. The picker named Surinder K. Nijjar did not appear to know her address or her phone number. Based on the information contained in the record, I accept the delegate's conclusion that this individual was not one of Nijjar's owners, who appears to have been interviewed separately.
27. Nijjar argues that the discrepancy between payroll records and the inspection sheets should be resolved in favour of the employer. I am unable to agree. Although the interview sheet demonstrates that very basic information was obtained, I am not persuaded that the records are so unreliable that they should not be considered the best evidence. Ms. Neville was not on site at the time of the Team visit and there are many possible reasons her payroll records may not correspond to the Team interview sheet. The record shows that the delegate accepted Ms. Neville's observation about the discrepancy in spelling in one of the names and accepted that this person was on the payroll. The delegate rejected Nijjar's other assertions. Given that the delegate offered Nijjar the opportunity to respond to the Team's observations, including a review of the inspection sheets, and then fairly considered the response, I am unable to conclude there was a denial of natural justice.
28. The delegate imposed a higher administrative penalty for the section 28 breach as this was Nijjar's second contravention. Nijjar's submission in respect of the penalties imposed suggests that the employer has confused the section 17 breach, for which the delegate imposed a penalty for a first time contravention, with the section 28 breach, for which the delegate imposed an amount reflecting a second contravention.
29. Section 17 of the *Act* provides that an employer must pay to an employee all wages earned by the employee in a pay period at least semi-monthly and within 8 days after the end of the pay period. Given that Nijjar acknowledged that it did not pay its employees in accordance with this section, I find no basis for its contention that the Director failed to comply with the principles of natural justice. Employers have an obligation to structure their affairs in a way that complies with relevant legislation.
30. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed or the amount of that penalty, since those amounts are prescribed by *Regulation*.

ORDER

31. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 8, 2011, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal