

EMPLOYMENT STANDARDS TRIBUNAL

In the Matter of an Appeal Pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

- by -

Baldev Singh Dhugha
Operating as D.N.C. Farm
("Dhugha")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE No.: 97/659

DATE OF DECISION: March 3, 1998

DECISION

OVERVIEW

This is an appeal by Baldev Singh Dhugha operating as D.N.C. Farm ("Dhugha") pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by William G. Bull, a delegate of the Director of Employment Standards on July 31, 1997. The Determination found Dhugha had contravened sections 18(1) and 18(2) of the *Employment Standards Regulation* ("*Regulation*") by failing to pay the piece work minimum wage and failing to display a notice regarding the resulting piece rate.

Dhugha filed an appeal on August 27, 1997, which was beyond the time limit for filing appeals, but the Tribunal granted an extension of time to allow the appeal to be heard. The parties were given until December 2, 1997 to file written submissions. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

I reproduce below, in its entirety, the Determination under appeal:

July 31, 1997

File No. 85370

Baldev Singh Dhugha operating as D.N.C. Farm
(address)

Dear Baldev Singh Dhugha operating as D.N.C. Farm:

**Re: Director of Employment Standards vs.
Baldev Singh Dhugha operating as D.N.C. Farm**

As Baldev Singh Dhugha operating as D.N.C. Farm has contravened a specified provision of a Part of the *Employment Standards Act* or a Part of the *Employment Standards Regulation*, there is a penalty in accordance with the prescribed schedule of penalties.

TAKE NOTICE that a further contravention by Baldev Singh Dhugha operating as D.N.C. Farm of the specified provision will result in a penalty of \$150.00 per employee as set out in section 29 of the *Employment Standards Regulations* [*sic*]. Contraventions beyond that may result in penalties to a maximum of \$500.00 per employee.

DETERMINATION

1. I find that Baldev Singh Dhugha operating as D.N.C. Farm has contravened section 18(1) of the *Employment Standards Regulation*. (Requirement to pay piece work minimum wage).

(c) blueberries.....\$.305 a pound

2. I find that Baldev Singh Dhugha operating as D.N.C. Farm has contravened section 18(2) of the *Employment Standards Regulation*. (Requirement to display notices).

(c) the resulting piece rate.

Yours truly,

(signed)
William G. Bull
Industrial Relations Officer
Fraser Valley Region

In his submissions on the appeal, Dhugha addresses an unnamed employee and raises allegations that the employee was not performing his work satisfactorily. In response, Mr. Bull sent a letter to the Tribunal dated October 23, 1997, which contains the following paragraph:

The arguments presented by the appellant are invalid since it does not state anywhere in Section 18(1) that the berries have to be "clean" berries. Section 18(1) of the *Employment Standards Act* states the minimum wages for the various vegetable, fruits, and berry crop hand harvested by farm workers on a piece work basis. There is no reference to the idea that the berries have to be "clean" to obtain the minimum piece rate. The Minimum piece rate for blueberries is \$0.305 per pound and the employer was paying \$0.28 per pound, that [*sic*] is a direct violation of Section 18(1).

Neither party addresses the alleged violation of section 18(2) of the *Regulation*, and I am left with the cryptic, skeletal statement regarding this violation quoted in the Determination, above.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Dhugha contravened sections 18(1) and (2) of the *Regulation* as alleged by the Director.

ANALYSIS

In my decision regarding another Determination issued against Dhugha by Mr. Bull on the same date (BC EST #D082/98), I commented on the lack of detail contained in the Determination under appeal, and remarked that the Tribunal (and possibly also the employer) must make further inquiries of the Director's delegate in order to discover the facts on which the Determination is based. I find the present Determination to be lacking in even a passing description of what the Director's delegate found to be a violation of the *Act*, when this was discovered, and how the delegate investigated the matter. I must piece together oblique references to facts in both the Appellant's and the Director's submissions, and having done so, I have found no facts that could support the Determination.

An appellant under the *Act* should not be put in the position of having to set out for me the facts on which the Director made a Determination. The appellant must demonstrate errors made by the

Director as to the facts or law which could justify setting aside or varying the Determination. In the present appeal, the Director has failed to set out even the barest of facts supporting the Determination against which I can assess and weigh the evidence and argument presented by Dhugha. The lack of information presented by the Director in both the Determination and written submissions is so serious that *prima facie* I am unable to see how the Determination is correct on its face.

My impression is that the Director did not care to properly and fairly inform the employer about the facts on which the Determination is based. The making of Determinations on the basis of unstated facts jeopardizes fairness in administrative decision-making, and turns the appeal process into a guessing game in which the Tribunal is expected to have faith that the Determination has a proper factual basis. The Determination under appeal is made in an unfair manner, it requires me to guess as to the facts upon which it is based, and there is no reason for me to have faith that those facts might in any event support the Determination itself.

The appeal process under the *Act* is intended to be a fair and efficient method of resolving appeals from the Director's Determinations. In the circumstances set out above, it would be doubly unfair to the employer if I were to allow the Determination to be repaired by referring the matter back to the Director under section 115(1)(b) of the *Act*. The power to remit, in my view, should be used where an issue has arisen on appeal which could not have been anticipated by the parties or which requires some further investigation before a decision can be made. In the case under appeal, the Director does not need to conduct any further investigation, and the only issue that the parties could not have anticipated is my concern that the Determination is fatally flawed. I have concluded that the Determination must be cancelled.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by William G. Bull should be set aside and the appeal should be allowed. Pursuant to s. 115 of the *Act*, I order that the Determination dated July 31, 1997 is cancelled.

Ian Lawson
Adjudicator
Employment Standards Tribunal