

An appeal

- by -

A & S Sandhu Enterprises Ltd.
(the “Employer” or “A & S”)

- 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.: 2015A/96

DATE OF DECISION: September 2, 2015

DECISION

SUBMISSIONS

Daljit Kaur Sandhu

on behalf of A & S Sandhu Enterprises Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), A & S Sandhu Enterprises Ltd. (the “Employer” or “A & S”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 10, 2015 (the “Determination”).
2. The Determination found that A & S had contravened Part 7, section 58 (vacation pay) and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Teja Sanghera (“Mr. Sanghera”), and ordered A & S to pay Mr. Sanghera wages in the amount of \$4,433.31, and to pay an administrative penalty under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00. The total amount of the Determination is \$4,933.31.
3. In its Appeal Form, A & S seeks the Employment Standards Tribunal (the “Tribunal”) to cancel the Determination, but fails to identify its grounds of appeal.
4. It should be noted that A & S’ deadline for filing the appeal was April 17, 2015, but the Tribunal only received the appeal on July 9, 2015. The appeal is, however, dated April 15, 2015, and the appeal includes a request for an extension of time to file an appeal on behalf of A & S by its accountant, Jasbir Singh Manku (“Mr. Manku”). Mr. Manku states that the appeal was faxed to the Director before the due date by mistake, and that A & S always intended to appeal the Determination. Mr. Manku attaches a fax confirmation form indicating that 16 pages were faxed on April 16, 2015, to the fax number for the Director.
5. In correspondence dated July 13, 2015, the Tribunal notified the parties that it had received an appeal from A & S, and the latter had requested the Tribunal to extend the deadline to file the appeal. The Tribunal further indicated that no submissions were being sought from any other party pending review of the appeal by the Tribunal, and that following such review, the Tribunal Member, without seeking submissions from the parties, may dismiss all or part of the appeal and/or confirm all or part of the Determination. If the Tribunal Member does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite Mr. Sanghera and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and A & S will be given an opportunity to make a final reply to those submissions, if any.
6. The section 112(5) “record” (the “Record”) was provided to the Tribunal by the Director on July 21, 2015, and the Tribunal sent a copy of same to A & S on July 22, 2015. A & S was given the opportunity to object to the completeness of the Record, but the latter did not object, and, accordingly, the Tribunal accepts it as complete.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess this appeal based on the Determination, the Reasons for the Determination (the “Reasons”), the appeal, the written submissions filed with the appeal by A & S, and my review of the material that was before the Director when the Determination was being made. Pursuant to section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If I do not dismiss all of the appeal or do not confirm all of the

Determination, Mr. Sanghera and the Director will be invited to file a reply to the question of whether to extend the deadline to file the appeal, and also provide a submission on the merits of the appeal. A & S will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

8. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

9. A & S is a British Columbia incorporated company licensed as a farm labour contractor.
10. Mr. Sanghera was employed as a farm worker with A & S commencing on June 15, 2007. His last day of work with A & S was August 18, 2014.
11. On September 11, 2014, Mr. Sanghera filed a complaint under section 74 of the *Act*, alleging that A & S contravened the *Act* by failing to pay him compensation for length of service contrary to section 63 of the *Act* (the “Complaint”).
12. On February 26, 2015, a delegate of the Director conducted a hearing into the Complaint (the “Hearing”). Mr. Sanghera attended at the Hearing on his own behalf and the Employer was represented by its Manager, Satinder Sandhu (“Mr. Sandhu”).
13. In the Reasons, the delegate summarizes the evidence presented by both parties at the Hearing.
14. With respect to the Employer, the delegate notes that A & S argued that Mr. Sanghera quit or abandoned his position with A & S. More particularly, Mr. Sandhu gave evidence that on August 18, 2014, Mr. Sanghera was performing work at the greenhouses on the Village Farms’ site in Delta, British Columbia, where A & S was contracted to provide labour. Previously, he states Village Farms gave several verbal warnings to Mr. Sanghera relating to his work but to no avail. Ultimately, Village Farms advised A & S’ site supervisor that there was no more work for Mr. Sanghera at Village Farms’ site and that he could stay at home the following day. As a result, A & S’ site supervisor, on August 18, 2014, informed Mr. Sanghera that he should go home, and call A & S the next day. However, states Mr. Sandhu, Mr. Sanghera did not contact A & S. Instead, a few days later, he received a call from someone named Sukhi Dakha (“Ms. Dakha”) who wanted to know why Village Farms did not want Mr. Sanghera to work at its greenhouses. In response, Mr. Sandhu states that he informed Ms. Dhaka that he could not talk about Mr. Sanghera with her. However, he shared with her that he did not know why Village Farms did not want Mr. Sanghera on their site, and that it was not his decision *not* to have Mr. Sanghera on the Village Farms’ site.
15. During his cross examination, the delegate notes that Mr. Sandhu admitted that A & S did not warn Mr. Sanghera about his work performance after Village Farms had the issue with Mr. Sanghera’s work. Mr. Sandhu also admitted that he did not speak to Mr. Sanghera on or after August 18, 2014, and no one else from A & S did either because A & S was expecting Mr. Sanghera to call. After A & S did not hear from Mr. Sanghera, it issued him a Record of Employment denoting “quit” as the reason for issuance.
16. Mr. Sandhu concluded his evidence stating that no one advised Mr. Sanghera that he was fired.
17. With respect to the evidence of Mr. Sanghera, the delegate notes that Mr. Sanghera contended that A & S terminated his employment on August 18, 2014, by not contacting him again after informing him that he was

no longer welcome at the Village Farms' site. More particularly, Mr. Sanghera testified that one of A & S' site supervisors told him, on August 18, 2014, that "you don't have any work here. Go home and call Mr. Sandhu." Mr. Sanghera stated that he went home and phoned Mr. Sandhu from his cell phone, as well as from his residential phone, but to no avail, as he received no answer. He then requested his daughter, Aman Sandhu ("Aman"), to phone Mr. Sandhu on the same day to inquire about his employment, but she was not able to connect with Mr. Sandhu either.

18. Aman's evidence at the Hearing was that after she was unable to connect with Mr. Sandhu, Ms. Dakha, who is a neighbour of both Aman and Mr. Sanghera and is considered family by them, came over and tried calling Mr. Sandhu. She was successful in reaching Mr. Sandhu.
19. In her testimony at the Hearing, Ms. Dakha stated that when she called Mr. Sandhu, the latter's wife gave her Mr. Sandhu's contact number. She was successful in reaching Mr. Sandhu. In her conversation with Mr. Sandhu, Ms. Dhaka stated that he advised her that he had to let employees go and that it was the Premier of the Province of BC's fault. However, when she, Aman and Mr. Sanghera contacted other employees of A & S the next day, they discovered that Mr. Sanghera was the only employee whose employment was terminated by A & S.
20. After setting out in the Reasons the evidence of the parties at the Hearing, the delegate then delineated the following governing legal test she would consider to determine the question of whether Mr. Sanghera abandoned or quit his position:

As the Employer's position is that Mr. Sanghera quit, the onus is on the Employer to establish that Mr. Sanghera quit his employment. It has been well established that the right to quit is personal to the employee and accordingly, there must be clear and unequivocal facts to support the conclusion that this right has been voluntarily exercised by the affected employee. The legal test for establishing when an employee can be determined to have quit his employment encompasses both a subjective and an objective element: subjectively, the employee must form an intention to quit employment, and objectively the employee must carry out an act inconsistent with his continued employment.

21. The delegate then went on to analyse the facts in this case in context of the legal test above and, in concluding that Mr. Sanghera did not quit his employment but A & S terminated it, reasoned as follows:

There is no dispute that Mr. Sanghera was told by A & S's site supervisor at the Village Farms site that his services were no longer wanted at Village Farms. There is also no dispute over whether Mr. Sanghera spoke to A & S after he returned home from work on August 18, 2014 or after that date. After work on August 18, 2014, Mr. Sanghera did not speak to anyone at A & S. It is agreed that Mr. Sandhu spoke to Ms. Dakha on or about August 18, 2014. While there is dispute over what Mr. Sandhu actually disclosed to Ms. Dakha, there is no dispute that Ms. Dakha phoned Mr. Sandhu out of concern for Mr. Sanghera because he was no longer welcome at the Village Farms site.

There must be unmistakable evidence of an employee's intention to quit before the Employer can be relieved of its obligation under section 63 of the Act. I am not satisfied that any failure on the part of Mr. Sanghera to contact A & S on or after August 18, 2014 was clear and unequivocal evidence that he intended to quit his employment. Mr. Sanghera was an employee of A & S, and a long-serving one [at] that. As a farm worker, Mr. Sanghera was under the control and direction of A & S. If there was no more work for Mr. Sanghera at the Village Farms work site, it was up to A & S to inform Mr. Sanghera where to report for future work. A & S admitted it did not contact Mr. Sanghera after August 18, 2014 because A & S expected that Mr. Sanghera would initiate the contact. As Mr. Sanghera was at the beck and call of A & S, I am simply not convinced that Mr. Sanghera abandoned his position with A & S or that he quit his employment.

I find that the act of an employer informing a farm worker that he is no longer to report to one work site and then not making any effort at all to contact the worker to inform him to report to a different work location or site is an act consistent with the termination of employment. Simply put, it was not and should not have been the responsibility of Mr. Sanghera to initiate contact with A & S to find out the status of his employment or to find out the location of an alternate work site. I find, therefore, that A & S terminated the employment of Mr. Sanghera on August 18, 2014, his last day worked. This termination was without written notice or compensation in lieu of written notice.

22. The delegate then went on to determine, based on Mr. Sanghera's length of continuous service with A & S, that the latter was entitled to seven (7) weeks' wages for compensation for length of service.

SUBMISSIONS OF A & S

23. In her written appeal submissions on behalf of A & S, Daljit Sandhu ("Ms. Sandhu"), the director and officer of A & S, states that Village Farms, who is a customer of A & S, was not happy with Mr. Sanghera's work and gave Mr. Sanghera various verbal warnings, but he ignored those warnings. As a result, Village Farms informed A & S' site supervisor that there was no work for Mr. Sanghera "as his work [was] not up to the mark". Therefore, A & S' site supervisor "rightly advised Mr. Sanghera to call the management of A & S". However, Mr. Sanghera failed to contact A & S to discuss the concerns raised by Village Farms and, therefore, "[i]t was our understanding that he quit the job".
24. Ms. Sandhu further states that Mr. Sandhu received a call from Ms. "Dhaka" [sic], and she asked questions about Mr. Sanghera's employment, which Mr. Sandhu refused to answer "due to confidentiality reasons". Ms. Sandhu further submits that Mr. Sanghera should have communicated with Mr. Sandhu in Punjabi but instead used a third party, Ms. "Dhaka" [sic], to discuss his employment conditions. Ms. Sandhu says that this is evidence of Mr. Sanghera's "unwillingness to work".
25. Ms. Sandhu also submits that A & S "never officially warned Mr. Sanghera about his work performance"; however, A & S' site supervisors "had various discussions with Mr. Sanghera regarding his work ethics". She states that Village Farms also warned Mr. Sanghera regarding his work performance but "he was unwilling to improve" and perform work "according to Village Farms' standards". As Village Farms' staff also supervises A & S' employees, Mr. Sanghera was also answerable to Village Farms at the latter's site, according to Ms. Sandhu.
26. She continues that while no one directly informed Mr. Sanghera that "he was fired", when A & S' site supervisor informed him that Village Farms did not want him at the work site due to his work ethics, "it was mutually understood that he is being terminated from that job site". However, she states that A & S did not terminate Mr. Sanghera's employment. She states A & S indicated "quit" on his Record of Employment because it was Mr. Sanghera's responsibility to contact A & S to discuss a new job, but he failed to do so.
27. Ms. Sandhu also submits that the delegate failed to contact A & S' witnesses, who included A & S' site supervisors and Village Farms' staff, who would have "shed a light on Mr. Sanghera's unwillingness to work" and his failure to follow instructions. She reiterates that Mr. Sanghera "quit" his job and "never contacted A & S Sandhu as he was not willing to work". In these circumstances, she states "Section 63 does not apply" and, therefore, "no termination letter was delivered to Mr. Sanghera". In the result, she also submits that the administrative penalty "should also be waived".
28. Lastly, Ms. Sandhu takes issue with the translator used at the Hearing to translate the evidence of Mr. Sanghera. She states that the translator was inexperienced and this "issue was brought to Director of Employment [S]tandards' attention".

ANALYSIS

29. Section 112(1) of the *Act* delineates the following grounds upon which a person may appeal a determination:

- (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.

30. As indicated previously, in its Appeal Form, A & S has failed to identify any specific grounds of appeal. This, however, is not fatal to A & S' appeal as the Tribunal does not take a mechanical approach to adjudicating an appeal. In *Triple S Transmission Inc.* (BC EST # D141/03), the Tribunal stated:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

31. Based on the Tribunal's very instructive comments in *Triple S Transmission* above, I have reviewed the written submissions of Ms. Sandhu with a view to determining if they invoke one or more of the statutory grounds of appeal in section 112(1) of the *Act*, and find that they do not. I propose to explain my reasons in support of this conclusion in the ensuing paragraphs.

32. In respect to the error of law ground of appeal in section 112 of the *Act*, 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.

33. Based on the definition of error of law set out above, I do not find A & S has shown any error of law was made by the delegate in making the Determination. More particularly, I am in agreement with the delegate's interpretation of section 63 of the *Act* and the legal test she employed for establishing when an employee can be determined to have quit his employment. The delegate appropriately considered the subjective and objective elements of the said test, and applied them appropriately to the facts in this case, to conclude that Mr. Sanghera did not quit his employment and A & S terminated it. Nor am I able to conclude that the delegate acted without any evidence or acted on a view of the facts which could reasonably be entertained, or adopted a method of assessment which is wrong in principle in concluding that Mr. Sanghera did not quit. Therefore I do not find any basis for the error of law ground of appeal.

34. With respect to the natural justice ground of appeal, I note that in *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal summarized the matters that typically arise in context of this ground of appeal 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 investigations 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 an adverse party. (see *BWT Business World Incorporated*, BC EST #D050/96)

35. As with the error of law ground of appeal, I do not find that the submissions of A & S and Ms. Sandhu establish any basis for me to cancel or change the Determination on the natural justice ground of appeal.

36. I note that Ms. Sandhu complains in her appeal submissions that A & S provided a list of witnesses to the delegate, which included staff of the Village Farms and A & S' site supervisors, who would have confirmed that Village Farms was unhappy with Mr. Sanghera's work, but the delegate did not contact these witnesses. The delegate's explanation, in the Reasons, is that she accepted A & S' submission that Village Farms was not happy with Mr. Sanghera's work and, therefore, there was no need to contact A & S' witnesses to confirm that Village Farms was unhappy with Mr. Sanghera's work. I do not find the delegate's decision to *not* contact A & S' witnesses constitutes a breach of natural justice. A & S, throughout the Hearing and in the appeal, has contended that Mr. Sanghera quit his employment by virtue of failing to contact A & S' management after August 18, 2014. A & S has not argued that it terminated Mr. Sanghera's employment for cause at any time (although there is an allegation of dissatisfaction with Mr. Sanghera's work). Therefore, any dissatisfaction that Village Farms or A & S may have had with Mr. Sanghera's work performance that A & S' witnesses may be able to "shed light on" is not relevant to the penultimate question of whether or not Mr. Sanghera quit his employment. In the circumstances, I do not find that there has been a breach of natural justice as a result the delegate's decision not to contact A & S' witnesses.

37. Lastly, on the natural justice issue, I also note that Ms. Sandhu, in her appeal submissions, raises an issue with the translation of the translator who translated at the Hearing. Ms. Sandhu contends that the translator was inexperienced and was not translating word for word what Mr. Sanghera was saying, or what the delegate or the Employer was saying. I am, here, persuaded with the delegate's conclusion in the Reasons that A & S had the burden of proving that Mr. Sanghera quit his employment, and the Employer required no translator to present its argument and evidence. Therefore, even if the translator's ability to translate for Mr. Sanghera was not perfect, or to Ms. Sandhu's or A & S' liking, it would not have affected the outcome of the delegate's decision, as the delegate's decision did not turn on Mr. Sanghera's evidence. Therefore, I do not find any basis to disturb the Determination on the natural justice ground of appeal.

38. Finally, with respect to the new evidence ground of appeal, I note that the applicable test for accepting new evidence on appeal is set out by the Tribunal in *Re: Merilus Technologies Inc.* (BC EST # D171/03). The test is a four-part test that an applicant requesting the Tribunal to admit new evidence must satisfy before the Tribunal will admit new evidence. In this case, I do not find that any new evidence is presented by A & S or Ms. Sandhu in the appeal. Ms. Sandhu's submissions are nothing short of a re-argument of the case A & S presented at the Hearing.

39. This Tribunal has stated time and again that an appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced at the hearing and rejected in the determination. I also note that allowing re-argument on appeal is contrary to one of the stated objectives of the *Act* in section 2(d), namely, the fair and efficient procedures for resolving disputes. In conclusion, I do not find that there is any basis for the new evidence ground of appeal.
40. In the result, I find A & S has not satisfied any of the grounds of appeal in section 112(1) of the *Act*, and I dismiss its appeal.

ORDER

41. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated March 10, 2015, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal