

An appeal

- by -

PMK Dhaliwal Enterprises Limited
(“PMK”)

- 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/126

DATE OF DECISION: November 19, 2015

DECISION

SUBMISSIONS

Mandeep Singh Dhaliwal

on behalf of PMK Dhaliwal Enterprises Limited

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), PMK Dhaliwal Enterprises Limited (“PMK”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 20, 2015 (the “Determination”).
2. The Determination found that PMK had contravened Part 3, section 16 (minimum wage) and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Amar K. Chahal (“Ms. Chahal”), and ordered PMK to pay Ms. Chahal wages in the amount of \$34.80 and levied 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 \$534.80.
3. PMK appeals the Determination, alleging the Director failed to observe the principles of natural justice in making the Determination. PMK seeks to have the Determination cancelled.
4. In correspondence, dated September 30, 2015, the Employment Standards Tribunal (the “Tribunal”) informed the parties, among other things, that no submissions were being sought from the parties pending review of the appeal by the Tribunal and that, following such review, all, or part of, the appeal might be dismissed.
5. On October 2, 2015, the Tribunal received the section 112(5) “record” (the “Record”) from the Director, and a copy was delivered to PMK by way of correspondence dated October 5, 2015. There was no objection to the Record taken by PMK and, accordingly, the Tribunal accepts the Record as complete.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form and written submissions made on behalf of PMK and my review of the Record that was before the Director when the Determination was being made. Under 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 that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), Ms. Chahal will, and the Director may, be invited to file further submissions.

ISSUE

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

THE FACTS

8. Based on a BC Online: Registrar of Companies – Corporation Search conducted by the delegate on August 10, 2015, PMK is a company incorporated under the laws of British Columbia on June 10, 2003, and Mandeep Dhaliwal (“Mr. Dhaliwal”) is listed as its sole director and officer.

9. On January 7, 2014, PMK was issued a farm labour contractor (“FLC”) licence by the Employment Standards Branch (the “Branch”) with an expiry date of January 6, 2017.
10. As a precondition to PMK obtaining the FLC licence, section 5(2) of the *Regulation* requires the applicant to pass a written examination in order to satisfy the Director of their knowledge of the *Act* and *Regulation*. Before the written examination is administered by the Branch, applicants are issued an application package that includes a study guide delineating the relevant requirements of the *Act* and *Regulation*. Furthermore, during the licensing process, applicants are taken through an interview checklist to ensure their understanding of the requirements of the *Act* and *Regulation*. One of the requirements in the checklist is section 18(1) of the *Regulation* which delineates the minimum wage to be paid to farm workers. Mr. Dhaliwal successfully completed the examination and fulfilled the prerequisites leading to the issuance of the FLC licence to PMK.
11. On May 21, 2015, the Branch’s Agriculture Compliance Team (the “Team”) carried out a work site visit at a farm on 9589 Johnson Road in Mission, British Columbia, where PMK was providing labour for harvesting rhubarb. The Team’s visit to the site was to ensure compliance with the *Act* and *Regulation* with respect to farm labour contractors, producers and farm workers.
12. During the site visit, the Team interviewed a random sample of PMK’s employees about their wages. One of those employees was Ms. Chahal. As a result of the Team’s interview with Ms. Chahal, the Branch issued a Demand for Employer Records (the “Demand”) to PMK on May 27, 2015, and received PMK’s records on June 12, 2015. According to the said records, Ms. Chahal received \$9.00 per hour for 27 hours worked, plus vacation pay in the amount of 4%, during the pay period May 15, 2015, to May 31, 2015.
13. Subsequently, on July 9, 2015, the delegate issued a further demand (the “Second Demand”) to PMK, requesting payroll records pertaining to Ms. Chahal for the six-month period of January 9, 2015, to July 9, 2015. Mr. Dhaliwal, however, informed the delegate that his earliest payroll record for Ms. Chahal shows that she commenced work with PMK on May 20, 2015, and her last day of work was May 22, 2015, when rhubarb harvesting had stopped. Mr. Dhaliwal also informed the delegate that Ms. Chahal used to work for him on a regular basis, but she is now retired and only works for him on a casual, sporadic basis whenever she chooses to. He had not seen her after the rhubarb harvest ended, and paid her for the three days in May that she worked, namely, May 20, 2015, to May 22, 2015, inclusive.
14. Based on the investigation findings, including the evidence of Mr. Dhaliwal and the payroll records of PMK pertaining to Ms. Chahal, the delegate concluded that Ms. Chahal was entitled to a minimum wage of \$10.25 per hour for all time she worked from May 20 to May 22, 2015. During the said period, she worked nine (9) hours per day, and PMK’s payroll records showed that PMK paid her only \$9.00 per hour plus vacation pay in the amount of 4%. Therefore, the delegate concluded, in the Reasons, that PMK owed Ms. Chahal a further \$33.75 in regular wages and a further \$1.05 in vacation pay, for a total of \$34.80, and so ordered PMK in the Determination. The delegate also levied an administrative penalty in the amount of \$500.00 against PMK for contravention of section 16 of the *Act* for failing to pay Ms. Chahal the required minimum wage.

SUBMISSIONS OF PMK

15. On behalf of PMK, Mr. Dhaliwal submits that when Ms. Chahal previously worked for him or PMK, her rate of pay was \$9.00 per hour, and that he forgot to change her rate. He states that he has now “paid her all the difference” and attaches two pages of documents showing some paystubs, one of which appears to be an undated paystub for an amount of \$34.83. He makes no further submissions.

ANALYSIS

16. The grounds of appeal under the *Act* are statutorily limited to those found in section 112(1):
- 112** (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.
17. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination, and that one of the statutory grounds of review identified in section 112 applies, namely: 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.
18. In this case, Mr. Dhaliwal's written submissions on appeal do not provide, demonstrate or establish a cogent evidentiary basis for any of the grounds of appeal identified in section 112 of the *Act*, including the sole ground of appeal— natural justice— PMK has checked off in the Appeal Form.
19. In *Imperial Limousine Service Ltd.* (BC EST #D014/05), the Tribunal summarized the principles of natural justice 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 by an adverse party. (see *BWT Business World Incorporated* BC EST #D050/96)
20. As the party alleging a breach of natural justice, PMK must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99). However, nothing in Mr. Dhaliwal's written appeal submissions or the Record remotely suggests that PMK was denied procedural protections of the principles of natural justice. To the contrary, there is ample evidence that PMK was afforded natural justice protections and took advantage of the opportunity to present its evidence to the delegate during the investigation stage before the Determination was made.
21. I also find that Mr. Dhaliwal's submissions do not challenge the findings of fact made by the delegate in the Reasons. Mr. Dhaliwal simply suggests that he forgot to change the pay rate for Ms. Chahal from when it was \$9.00 (to \$10.25) during the material period. He states, however, PMK has now paid Ms. Chahal the difference. Payment, after the Determination is made, does not undo the fact that PMK breached section 16 of the *Act* by failing to pay Ms. Chahal, in a timely fashion, minimum wage for the hours she worked during the period May 20 to May 22, 2015. I find the delegate properly imposed an administrative penalty of \$500.00 against PMK, pursuant to section 29 of the *Regulation*, for breach of section 16 of the *Act* and there is no legitimate basis on which this tribunal can interfere with that decision.

22. In these circumstances, I find no basis for allowing the natural justice ground of appeal or disturbing the Determination on any other basis. I find there is no possibility this appeal can succeed, and it is dismissed under section 114(1)(f) of the *Act*.

ORDER

23. Pursuant to section 115 of the *Act*, I order the Determination, dated August 20, 2015, be confirmed in the amount of \$534.80, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal