Employment Standards TRIBUNAL

An appeal

- by -

Donald Perlitz operating as Rim Rock Haven Ranch

- 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: John Savage

FILE No.: 2005A/65

DATE OF DECISION: August 17, 2005

DECISION

SUBMISSIONS

Don Perlitz, for the Employer Rim Rock Haven Ranch

Brent E. Johnston, for the Employee Brent E. Johnston

Hans Suhr, for the Director of Employment Standards

OVERVIEW

1. Brent E. Johnston ("Johnston") filed a complaint alleging that Donald Perlitz ("Perlitz"), operating as Rim Rock Haven Ranch, had contravened the *Employment Standards Act* by failing to pay all wages earned.

2. Johnston was employed as a farm worker for two months from August 27, 2004 to October 25, 2004. The Delegate found that Johnston was employed at the rate of $1200 per month plus free accommodation. There was a dispute between the parties on the hours worked and whether the work week contemplated a 5 or 6 day work week.

3. Perlitz did not maintain records of the hours that Johnston worked. Johnston's evidence was that he kept daily records, but the records contained errors that Johnston was unable to explain.

4. With respect to the hours worked the Delegate found that "Neither the evidence of Perlitz or Johnston is helpful, as it cannot be considered accurate with respect to the hours actually worked by Johnston".

5. Other witnesses were not helpful on the issue of hours worked. Marcela Pozdimek, Johnston's wife, testified on behalf of Johnston, but the Delegate found that this evidence was not helpful "…as she is only able to verify that Johnston went to work and came home from work and not how many hours Johnston actually worked each day".

6. The employer's witnesses were only able to testify with respect to isolated periods and thus their evidence was not useful in determining the hours worked. The Delegate found that "…as there are no credible records with respect to the actual hours worked, I am not prepared to speculate whether the employer contravened the minimum wage provisions of the Act".

7. For various reasons Perlitz found Johnston's work unsatisfactory. It was agreed that Perlitz deducted from Johnston's wages amounts for Hydro, honey, and for the time it took Perlitz to repair a pheasant fence, re-sort cattle, move furniture back into the house, and for damages to the electric motor on an irrigation pump.

8. The Delegate found that Perlitz deducted $192.12 for Hydro and honey. Perlitz also admitted that he deducted $20 for work he had to do to correct the "mistakes" made by Johnston, and $259.38 for damage done to an electric motor (the total repair cost was $647.35). The total deductions, then, were $471.50.

9. The Delegate found that Perlitz owed Johnston $599.91 based on his own calculation of what wages were earned, the agreed upon wages paid, and the agreed upon deductions for Hydro and honey. In the course

of his decision the Delegate found breaches of Section 18 (failing to pay wages on termination), 21 (making unauthorized deductions), 28 (not keeping records as required) and 58 (not paying annual vacation) of the *Employment Standards Act*.

10. Perlitz filed an appeal asserting that he Director erred in law. He says that "holiday pay" was paid based on a salary of $1200 / month plus benefits. He says that the Delegate erred in rewriting the contract and in applying unfair administrative penalties.

ISSUES

11. Did the Delegate err in law in calculating the amount owed pursuant to the contract of employment?

12. Did the Delegate err in law in applying the administrative penalties?

Appeal Provision

13. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) The director erred in law;

(b) The director failed to observe the principles of natural justice in making the determination; or

(c) Evidence has become available that was not available at the time the determination was being made.

14. The burden of establishing that a Determination is incorrect rests with an Appellant: *Natalie Garbuzova* BC EST #D684/01.

Hours of Work & Wages Owed

15. As I have noted, the Delegate found that "…as there are no credible records with respect to the actual hours worked, I am not prepared to speculate whether the employer contravened the minimum wage provisions of the Act".

16. The Delegate also found that third party information was not of assistance.

17. With respect to the evidence of the principals, the Delegate found that "Neither the evidence of Perlitz or Johnston is helpful, as it cannot be considered accurate with respect to the hours actually worked by Johnston".

18. Having found that there were neither credible records nor helpful or accurate evidence from the parties in dispute or third parties, the Delegate then proceeded to determine that wages were owed based on his interpretation of the contract of employment, but without making findings on the hours worked.

19. Section 28 of the *Employment Standards Act* sets forth the requirement of an employer to keep records with respect to an employee. It provides as follows:

> 28 (1) For each employee, an employer must keep records of the following information:
> (a) the employee's name, date of birth, occupation, telephone number and residential address;
> (b) the date employment began;
> (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
> (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
> (e) the benefits paid to the employee by the employer;
> (f) the employee's gross and net wages for each pay period;
> (g) each deduction made from the employee's wages and the reason for it;
> (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
> (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
> (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
> (2) Payroll records must
> (a) be in English,
> (b) be kept at the employer's principal place of business in British Columbia, and
> (c) be retained by the employer for 2 years after the employment terminates.
> 1995, c. 38, s. 28; 1998, c. 36, s. 3, part; 2002, c. 42, s. 9.

20. The Delegate noted that "Perlitz's evidence was that he sometimes kept track of the times that Johnston did not work because he was not going to pay him for those times". Section 28 requires that the employer keep records *inter alia* "…of the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis". Perlitz did not keep such records.

21. The record keeping provisions of section 28 are expressly mandatory: the employer "must keep" such records. The purpose of keeping such records facilitates ensuring that the provisions of the *Act* are complied with, but such record keeping also benefits both employers and employees in these disputes as contemporaneous business records are often the best evidence of the facts they record.

22. The Delegate did not err in finding that Perlitz failed to keep records as required by section 28.

Unauthorized Deductions

23. Perlitz acknowledged that he made deductions from what he would otherwise have paid Johnston. The uncontradicted evidence before the Delegate, including that of Perlitz, was that Perlitz deducted from wages $471.50.

24. The Delegate found that part of this related to Hydro and honey, that Johnston had agreed to pay for, but that the rest of this involved set-offs and payment for broken machinery, that the Delegate found to be the employer's "business costs". I agree that the set-offs and payment for broken machinery are "business costs".

25. Subsection 21(1) of the *Employment Standards Act* requires that any deductions made from wages be permitted by the *Employment Standards* or other enactments. The purpose of this subsection is to ensure

that employees receive the full measure of wages to which they are entitled, recognizing that employer and employee are in unequal bargaining positions and the employee in a position of dependence: *Re Park Hotel (Edmonton) Ltd.* BC EST D#257/99. Moreover, neither the Director or his Delegates, nor this Tribunal on appeal, have the jurisdiction to resolve civil claims or "set-offs": *Re Scanditours Canada Inc.* BC EST D#177/03

26. Section 21 provides as follows:

> 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
> 1995, c. 38, s. 21.

27. There is nothing in the *Employment Standards Act*, or in any other enactment of British Columbia or Canada, that permits any of these deductions.

28. Neither the Director nor Johnston has appealed the deduction of $192.12 made by Perlitz from wages. While this was not authorized by the *Act* the record below shows that Johnston agreed to this deduction and it was not disputed in this appeal. In these circumstances I am not prepared to amend the Delegate's order.

29. As Perlitz admitted to making these deductions, and they are not authorized by the *Act*, the Delegate made no error in finding that Perlitz breached section 21 of the *Employment Standards Act*, and Perlitz is liable for an administrative penalty as noted below.

Unpaid Wages & Vacation Pay

30. The Delegate found that Perlitz owed Johnston wages. While he was unable to make findings on the hours actually worked, he concluded that the contract of employment paid Johnston a daily rate.

31. The Delegate concluded that the contract called for a variably daily rate: a rate of $46.15 per day for the months of August and September and a rate of $44.44 for the month of October. The Delegate was able to calculate the number of days worked and based on this concluded that Perlitz owed wages to Johnston of $706.57 less agreed upon deductions.

32. It may seem incongruous that a contract of employment would call for different daily rates for different months. A review of the calendar for the month of October, 2004 indicates, however, that there are 26 not 27 "working days" in this month (there are 5 Sundays in October, 2004). Thus the appropriate daily rate for October arguably should be the same as that for August and September. If that were so, then the amount owed by Perlitz would be slightly higher than that found by the Delegate.

33. The position of Perlitz is that Johnston was paid $40 per day. Even if Perlitz was correct on this, however, based on the findings of the Delegate, Perlitz would owe wages. The Delegate found that Perlitz

worked a total of 47 days. At $40 per day the amount owed for wages would be $1880. The agreed upon deductions of the amount paid, $1430, and the sum of $192.12 still leaves a balance owing of $257.88.

34. It follows that whether the Delegate or Perlitz is correct on the appropriate daily rate some wages are owed Johnston.

35. The Delegate found that Perlitz owed vacation pay without making any findings on the hours worked by Johnston. Perlitz said that vacation pay was included in the monthly rate paid Johnston. The "Contractors Agreement", referred to in the evidence is silent on the question of vacation pay. Since Perlitz kept no records his argument that vacation pay is included in the monthly rate is without any independent support.

36. Vacation pay is payable based on 4% of the employee's total wages. In the absence of proper records, the Delegate determined the days worked and based on the evidentiary tools he had, calculated the wages due. He then calculated 4% of total wages as being owed for vacation pay.

37. In a number of decisions of the Employment Standards Tribunal, panels have adopted the 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.).

38. The definition of "error of law" can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;

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 methodology that is wrong in principle.

39. It is not suggested that the Delegate erred in the manner described by items 1, 2, or 5. While Perlitz argues that the Delegate was re-writing the contract of employment, the foundation of the problem lies with the unsatisfactory evidence before the Delegate, and, most importantly, the Employer's failure to maintain proper employment records.

40. In applying these tests to the evidence before the Delegate I am also mindful that this Tribunal has, consistent with the fair and efficient determination of disputes, afforded the Director considerable latitude in fashioning a remedy in such circumstances: *Mykonos Taverna Operation as the Achillion Restaurant* EST D# 576/98. It is not material whether this Tribunal would come to the same conclusion as that of the Delegate. The Decision of the Delegate is only reviewable, in these circumstances, if there is either no evidence or if the view of the facts taken could not reasonably be entertained.

41. In my view, no error of law has been demonstrated.

Administrative Penalties

42. The *Employment Standards Regulation*, BC Regulation 396/95 provides for mandatory administrative penalties. Subsection 29(1) of the *Regulation* provides as follows:

> 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500;
> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2 500;
> (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10 000.

43. The *Regulation* provides for mandatory penalties that escalate from $500 to $10,000 where there are contraventions of the *Act* or regulations. In this case there are four provisions that have been contravened. There is no evidence that the Employer has contravened these provisions prior to this occasion.

44. The *Regulation* provides that "…a person who contravenes a provision of this Act or this regulation, as found by the director in a determination made under the Act, must pay…" the indicated administrative penalties. This provision does not confer discretion on the Director. Subsection 29(1) expressly provides that a person who contravenes the Act or regulation "must pay" the indicated administrative penalty.

45. The provision is expressed in mandatory terms. This Tribunal has consistently held that, if the breaches are made out, it has no discretion to relieve against these penalties on appeal. For example, in *K Girn Enterprises* BC EST#D077/05 member Stevenson summarized the law as follows:

> On the matter of the administrative penalties imposed by the Director, it is noted first that the Tribunal has indicated in *Summit Security Group Ltd.*, BC EST #D133/04 (Reconsideration of BC EST #D059/04), that the administrative penalty scheme in the *Act* is generally consistent with the purposes of the *Act*, relating to the purpose of ensuring employees receive at least basic terms and conditions of employment, encouraging open communication between employees and their employers and providing fair and efficient procedures for the resolution of disputes.
>
> The Tribunal has confirmed in several other decisions that once a contravention of the *Act* has been found in a Determination, the imposition of an administrative penalty is mandatory (see, for example, *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04, and *Kimberly Dawn Kopchuk*, BC EST #D049/05. In the *Marana Management Services* decision, the Tribunal stated:
>
> > Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory . . .

> Girn has argued that it is unfair to impose administrative penalties in the amount of $2000.00 where the company acted in good faith and made best efforts to comply with the *Act*. However, in considering an appeal of administrative penalties, as with an appeal of any other aspect of a Determination, an appellant is limited to the grounds of appeal set out in Section 112(1) of the *Act*, above. That provision does not include considerations of "fairness" or whether the employer has acted in "good faith" or with "best efforts" as providing grounds for appealing the mandatory administrative penalties imposed under Section 29 of the *Regulation* (see *Actton Super-Save Gas Stations Ltd*., BC EST #D067/04).

46. As I have found there were four breaches of the *Act* made out, and there is no evidence that these provisions have been previously contravened, the penalty for each breach is $500 or $2000 in total. While this penalty may seem harsh, in the absence of specific legislative authority this Tribunal has no power to relieve against these penalties.

SUMMARY

47. The appeal is dismissed and the Decision of the Delegate is confirmed.

48. The amount owing then is wages in the amount of $599.91 and interest and the administrative penalties in the amount of $2000.

John Savage
Member
Employment Standards Tribunal