



An appeal

- by -

Sundeeep Kajla carrying on business as Colebrook Farms
(“Colebrook”)

- 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.: 2016A/128

DATE OF DECISION: November 2, 2016

DECISION

SUBMISSIONS

Sundeep Kajla on his own behalf, carrying on business as Colebrook Farms

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), Sundeep Singh Kajla carrying on business as Colebrook Farms (“Colebrook”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on August 23, 2016.
2. The Director’s delegate determined that Colebrook had contravened sections 9, 18 and 28 of the *Act* in failing to pay JD1¹ wages. The Director ordered Colebrook to pay \$15.73 in wages and interest. The Director also imposed two \$500 administrative penalties and one \$2,500 penalty for Colebrook’s contraventions for a total amount owing of \$3,515.73.
3. Colebrook appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination and erred in law.
4. This decision is based on the submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Mr. Kajla is the sole proprietor of Colebrook Farms, a company which operates blueberry farms. On June 28, 2016, the Agriculture Compliance Team (“the Team”) conducted an inspection at Colebrook’s work site. The Team conducted interviews with employees at the site, reviewed payroll records and inspected the work area.
6. The members of the Team interviewed 14 employees, including JD1, JD2², JD3³ and Mr. D⁴. JD2 stated that he was 15 years old, born August 19, 2000, and began working for Colebrook on June 28, 2016. JD3 said that she was 14 years old, born March 5, 2002, and began working for Colebrook on June 28, 2016. KM⁵ said that she was 14 years old, also born March 5, 2002. JD1 said that he was 11 years old, born December 12, 2004, and that he attended elementary school. Mr. D is the father of JD1, JD2, JD3 and the uncle of KM.
7. The Team observed JD1 picking berries and putting them into his father’s bucket. He did not eat any. JD1 said that he arrived at the farm at 9:00 a.m. with his father, and that he would be picking with his father until his father left at 1 or 2 p.m. that day. Mr. D told the Team members that he could not get a babysitter that day, so brought JD1 with him to work. Colebrook did not ask Mr. D for written permission to employ his son.

¹ JD1 is a minor child under the age of 12

² JD2 is a minor child

³ JD3 is a minor child

⁴ Identifying Mr. D would identify the minor children. His name is therefore anonymized

⁵ KM is a minor child

8. One of the Team members spoke with Mr. Kajla and asked whether he was aware of the provisions of the *Act* relating to child employment. He was not. Mr. Kajla was also asked whether he was aware that a child under the age of 12 was picking blueberries at his farm. Mr. Kajla said that it was “debatable” whether the child was working and suggested he was just accompanying his father, laying around and eating berries. A Team member informed Mr. Kajla that three delegates of the director observed JD1 diligently picking berries and putting them into his father’s bucket. The three Team members and Mr. Kajla then all observed JD1 still picking berries. Mr. Kajla informed the Team that he did not know, prior to the Team’s arrival, that JD1 was at the farm, that he employed a lot of transient workers, and was not aware that he required written permission from the Director to employ a child under the age of 12.
9. The Team told Mr. Kajla to take immediate measures to ensure JD1 was no longer working and to make arrangements with Mr. D to have JD1 removed from the site. The Team informed Mr. Kajla about the *Act*’s requirements regarding child employment and his obligation to know who was working at the farm. After observing Mr. Kajla instruct Mr. D to take his son home, the Team left the farm.
10. On July 15, 2016, the delegate sent Mr. Kajla a letter informing him of the Team’s observations on June 28, 2016. The delegate indicated that a preliminary assessment suggested that Colebrook had failed to comply with section 9 of the *Act* by employing JD1 without the Director’s permission and invited Mr. Kajla to respond. The delegate also issued a Demand for Employer Records for all employees working at Colebrook on June 28, 2016, including JD1, and informed Mr. Kajla that the Team would be conducting an audit of those employees’ payroll records.
11. On July 29, 2016, Mr. Kajla hand-delivered a letter, payroll summaries and written permission from Mr. D to employ JD3 and KM. The letter was a summary of the information Mr. Kajla provided to the Team members on June 28, 2016. The Payroll records did not include any information for JD1. Mr. Kajla stated that he did not keep any records for JD1 because he went home after the Team’s visit on June 28. He also stated that he did not pay JD1 because all of the berries he picked went into his father’s bucket.
12. The delegate determined that Colebrook had contravened section 9(2) of the *Act* by employing a child under the age of 12 without the Director’s permission and imposed an administrative penalty of \$500 for the contravention.
13. The delegate also determined that Colebrook had failed to comply with section 28 of the *Act* in failing to maintain payroll records for JD1. Noting that Colebrook had been found in contravention of section 28 on August 4, 2015, the delegate imposed an administrative penalty in the escalated amount of \$2,500.
14. Finally, noting that JD1 picked blueberries for at least one and one half hours on June 28, 2016, the delegate determined that Colebrook had contravened section 18 of the *Act* in not paying JD1 wages.
15. In the appeal submissions, Mr. Kajla said that he was not aware that JD1 was working on the farm as he arrived at the farm after the Team, and that upon learning that JD1 was working, sent him home. He also says JD1 did get paid for the work he performed and that he has the records to confirm that. Mr. Kajla contends that Colebrook paid JD1’s father for the berries JD1 picked, as making a separate cheque was “not worth it”. Mr. Kajla says he was confused by the fact that he was asked for payroll records, and given that JD1 was not an employee, he did not provide payment details for the work that JD1 performed.

ANALYSIS

16. 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;
- evidence has become available that was not available at the time the determination was being made.

17. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Colebrook has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

18. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

19. I find no basis for this ground of appeal. On July 15, 2016, the delegate informed Colebrook of the June 28, 2016, observations and offered it the opportunity to respond to the delegate's preliminary assessment that it was in contravention of section 9 of the *Act*. Mr. Kajla did respond to the observations.

20. Furthermore, the Director issued a demand for Employer Records, including, specifically, all payroll records relating to the wages, hours of work and conditions of employment for JD1. Included with the Demand were documents outlining what payroll records included and consequences of failures to comply with the *Act*.

21. The record indicates that Colebrook submitted wage information for all of the workers on the farm on June 28, 2016, but for JD1. There is no indication in those records that JD1's wages were included with those of Mr. D. There is also no record of the hours worked by JD1.

22. On August 18, 2016, the delegate had a telephone conversation with Mr. Kajla regarding JD1's wages. Mr. Kajla informed the delegate that he did not keep any payroll records for JD1, and that prior to leaving the farm, JD1 dumped the blueberries he was picking into his father's bucket. There was no suggestion during this discussion that Colebrook paid Mr. D for his son's berries.

New Evidence

23. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
24. Colebrook provides additional information and an explanation for its failure to provide the necessary documentation on appeal.
25. Section 112 of the *Act* is not meant to be a reexamination of a complaint but rather a review of the evidence and the underlying Determination. The Tribunal does not allow the appeal procedure to be used to make a case that should have been provided to the Delegate during the investigative process. See *Tri-West Tractor Ltd.* BC EST # D268/96; *Re: Kaiser Stables Ltd.* BC EST # D058/97. Not only is the “new evidence” different from the information initially provided during the investigation process, the information was clearly available at the time the delegate was investigating the contravention. Furthermore, I am not persuaded that the evidence could have led the Director to a different conclusion on the material issue.
26. I also find no error of law in the delegate’s Determination.
27. I conclude that Colebrook has not met the burden of establishing any of the statutory grounds of appeal. I find the appeal has no prospect of success and it would not serve the objects and purposes of the *Act* to require submissions from the other parties.
28. The appeal is dismissed.

ORDER

29. Pursuant to section 115 of the *Act*, order that the Determination, dated August 23, 2016, be confirmed in the amount of \$3,515.73 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal