Employment Standards TRIBUNAL

An appeal

- by -

Progressive Inter-Cultural Community Services Society
(the “Employer”)

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/76, 2003A/77 & 2003A/78

DATE OF DECISION: May 14, 2003

DECISION

INTRODUCTION

The Determinations

Progressive Intercultural Community Services Society (the "Employer") appeals three separate determinations each of which was issued pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) on February 11th, 2003. The particulars with respect to each of the determinations are set out below:

EST File No.	No. of employees	Issue	Amount	Penalty Issued
2003A/077	13	Overtime pay	$ 1,516.21	$0
2003A/078	17	Minimum wages	$13,818.11	$0
2003A/078	17	Statutory holiday pay	$ 371.49	$0

Request for an Oral Hearing

The Employer, in each appeal, has requested an oral hearing. It is clear, on the face of the material filed with the Tribunal, that the appellant wishes to use an oral hearing as a public forum to air its concerns about what it alleges are widespread "fraudulent practices" and other systemic abuses within the agricultural sector, and more particularly, in regard to employer record-keeping and pay practices.

However, an appeal to the Tribunal is not a Royal Commission or some other formal board of inquiry. The function of an appeal is to determine whether a determination ought to be cancelled or varied (or referred back to the Director) in accordance with one or more of the statutory grounds of appeal. These appeals appear to have been filed for an improper purpose, or at least for a purpose not contemplated by the *Act*. I, for one, have no intention of allowing the Tribunal's appeal process to be high-jacked by a party who wishes to use the process to advance their own political agenda--particularly when the individual employees involved are taken along as hostages to that agenda. In light of the section 2 purposes of the *Act*, I cannot conceive how the Employer's demand for a kind of "show trial" will advance the Tribunal's obligation to ensure that disputes arising under the *Act* are fairly and efficiently adjudicated.

The Tribunal's Vice-chair wrote to the parties, on April 16th, 2003, and advised them that these appeals would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Having reviewed the material filed in support of these appeals, I must say that I entirely agree with the Vice-chair that these appeals can easily be adjudicated without the delay, expense and inconvenience of an oral hearing. I see absolutely no need to require the attendance of a large number of employees at an oral hearing when the issues in dispute can be readily addressed without an oral hearing.

I shall now address each of the three appeals in turn. For the sake of convenience, I will refer to the three determinations as, respectively, the "Overtime Determination", the "Minimum Wage Determination" and the "Statutory Holiday Pay Determination".

THE OVERTIME DETERMINATION

The Delegate's Investigation

As recorded in the determination, the delegate, on November 18th, 2002 and as part of a general payroll audit, issued a Demand for production of the Employer's payroll records--see section 85(1) of the *Act.* The Employer (who is a "farm labour contractor" as defined in section 1 of the *Act*) complied with the Demand and produced various records to the delegate on December 11th, 2002.

The delegate reviewed the Employer's records and, having done so, determined that 13 individual employees (identified in a schedule appended to the determination) were not paid overtime pay in accordance with section 23 of the *Employment Standards Regulation.* This latter provision specified that an employer who required or allowed a "farm worker" (defined in section 1 of the *Regulation*) to work more than 120 hours within a 2 week period must pay that worker at least double their "regular wage" (defined in section 1 of the *Act*) for all hours worked beyond the 120-hour threshold (this provision has since been amended to provide for a time and one-half premium). It should be noted that this regulatory provision stood in contrast to the overtime provision then in force governing most other employees (section 40 of the *Act*) which provided for overtime pay after 8 hours in a day or 40 hours in a week.

In any event, after reviewing the Employer's records the delegate afforded the Employer an opportunity to explain why the employees were not being paid in accordance with section 23 of the *Regulation;* the Employer was not able to offer any satisfactory explanation. In light of the obvious contravention of the *Act* and *Regulation*, the delegate issued a determination reflecting the unpaid overtime pay, a $0 penalty (see section 29 of the *Regulation*) and put the Employer on notice that further contraventions could result in a higher monetary penalty and/or the cancellation or suspension of the Employer's farm labour contractor's licence (see section 7 of the *Regulation*).

The Employer's Appeal

The Employer seeks an order cancelling the determination on the ground that the Director's delegate erred in law [see section 112(1)(a) of the *Act*]. This appeal, on its face, is totally devoid of merit. The Employer, in essence, admits that it failed to comply with section 23 of the *Regulation* but says, among other things, that:

- the delegate "totally ignored the ground realities of how the seasonal work system fluctuates in the agricultural sector";

- "It is an established practice for workers to maximize their earnings by working more than 120 hours a week and this by overriding the protest of the growers as well as the contractors";

- "It is a well established fact that no grower or contractor ever pay [sic] overtime wages for picking blueberries. The records of hours worked are fudged 95% of the time to avoid paying the workers overtime"; and

- "We have reflected the records accurately and explained the reasons when people on their own accord overriding our protest simply worked extra hours to maximize their earnings".

Elsewhere in its appeal form the Employer advances the suggestion that "we got licensed as a contractor with a single objective to demonstrate [a] good and fair working model for contractors". I fail to see how the Employer's practice of not paying overtime in accordance with the provisions of section 23 of the *Regulation* advances its avowed position to "demonstrate a good and fair working model".

With respect to its other assertions, it has always been (and continues to be) an employer's right to direct and manage its workforce. Employees do not decide how much extra paid work they will do; that is the employer's call. An employer is perfectly free to say to its employees that no overtime is to be worked or that only a certain amount of overtime is to be worked. If an employee refuses to abide by the employer's explicit directions in that regard, then the proper response is for the employer to discipline and, if the behaviour persists, perhaps even terminate the insubordinate employee. However, if the employer requires or allows the employee to work overtime, the employee is entitled to be paid for those overtime hours in accordance with the *Act* and *Regulation.* It should be remembered that the delegate relied on the Employer's own records which, of itself, is very good presumptive evidence that the hours in question were worked with, at the very least, the Employer's tacit approval.

Finally, in its April 15th, 2003 submission to the Tribunal, the Employer states "we are absolutely willing to pay the workers these amounts" [referring to the overtime payments]. That being so, where is the alleged error of law?

If other employers are not complying with the *Act* or *Regulation*, that is a matter for the Director to address through her extensive enforcement powers given to her under the *Act.* However, even if some employers are not complying with the *Act* or *Regulation*, that most certainly is not a defence for this Employer. Some taxpayers do not pay their taxes; some drivers speed--in either case, that unlawful behaviour does not give the rest of society a lawful excuse to ignore their legal obligations.

In sum, this appeal is, on its face, entirely devoid of merit and must be dismissed.

THE MINIMUM WAGE DETERMINATION

The Delegate's Investigation

As noted above, on November 18th, 2002 and as part of a general payroll audit, the delegate issued a Demand for production of the Employer's payroll records. Pursuant to this Demand, the Employer produced various records on December 11th, 2002. After reviewing the Employer's payroll records, the delegate determined that a number of employees did not receive at least the applicable minimum wage for all hours worked.

At the relevant time period, farm workers who were paid on a piece work basis for hand harvesting certain crops (identified in section 18 of the *Regulation*) were entitled to $0.154 per pound for brussels sprouts and were entitled to be paid at least $8 per hour for other crops (such as cauliflower and broccoli) for which a piece rate was not specified in the *Regulation.* The delegate concluded that the Employer did not pay 17 of its employees all of the wages to which they were entitled under the *Regulation.* Thus, a determination was issued for the total amount due to the 17 employees ($13,818.11)--the amounts payable to each employee ranged from $103.20 to $1,118.93; nine of the employees were owed in excess of $1,000. In addition, the delegate levied a $0 monetary penalty.

The Employer's Appeal

The Employer seeks an order cancelling the determination on the ground that the Director's delegate erred in law [see section 112(1)(a) of the *Act*]. So far as I can gather, the Employer does not take issue with respect to its failure to pay the employees the specified piece rate for brussels sprouts. However, the Employer says that it should not have been ordered to pay $8 per hour to employees who were hand picking cauliflower or broccoli. In particular, the Employer says:

> "It is true that there is no minimum piece rates established for these crops [*i.e.*, cauliflower and broccoli] under Section 18(1) of the regulation but in reality it is an established practice that the workers are paid on a piece rate basis. These piece rates are established on an arbitrary basis based on market forces by the growers."

I fail to see how the delegate could have erred in law when he simply applied the relevant provisions of the *Act* and *Regulation* as written. The Director does not have the authority to, in effect, ignore the dictates of the legislature and apply her own brand of workplace justice. The Employer states, in its appeal documents, that "The Ministry of Agriculture needs to rectify this situation by including Broccoli and Cauliflower in the list of crops for which minimum wages have been specified". While this might be a laudable initiative, the Employer's remedy in this latter regard lies in the political arena not in an appeal to this Tribunal.

It must be remembered that the wage rates established by the *Regulation* are minimum standards and are not, necessarily, intended to reflect "market forces". As a matter of public policy, the government has established minimum wage rates that, in some measure, attempt to prevent the exploitation of vulnerable workers that might otherwise occur if wages were determined solely on the basis of what a particular employer might be prepared to pay and what a particular employee might be prepared to accept. In *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986, the Supreme Court of Canada observed that the object of employment standards legislation was to require employers to comply with certain minimum terms and conditions of employment and that such legislation should be interpreted in a manner that "extends its protections to as many employees as possible".

If the Employer's position prevailed, the result would be that the protections of the *Act* would not be extended to the workers in question, a group that, historically--even the Employer acknowledges--have been vulnerable to exploitation (see also *Rights and Responsibilities in a Changing Workplace*, the 1994 report of Commissioner Thompson who reviewed B.C.'s employment standards legislation and who identified some of the very real problems faced by farm workers in the Fraser Valley, esp. pp. 41 to 53).

The Employer also challenges the determination on the basis that the Director's delegate failed to observe the principles of natural justice in making the determination [section 112(1)(b) of the *Act*]. The Employer's argument in this regard can be distilled to the simple assertion that the entire industry is corrupt and there is a systemic failure on the part of various principals in the industry to comply with the *Act* and *Regulation.* Without accepting the truth of that assertion (and it has not been proven before me), it must be noted that, in this case, the Employer's failure to comply with the *Act* and *Regulation* was clear (and, indeed, appears to be uncontested). Prior to issuing the determination, the Employer was given an opportunity to present its position vis-à-vis its liability for unpaid wages and, with that in hand, the delegate then issued a determination entirely in keeping with his jurisdiction under the *Act.*

Finally, I might add that if the rule of law is to have any meaning at all, societal actors must comply with the law as it is written. Employers, for example, cannot be allowed to decide which particular laws they will respect. The Employer suggests that the "Ministry of Labour" (among others) is a party to some sort of conspiracy to ignore the provisions of the *Act* and *Regulation* in the Fraser Valley's agricultural sector. However, the fact that this determination was issued as a result of an audit undertaken to ensure compliance is, of itself, evidence that undermines the Employer's assertion at least insofar as the Ministry, the Director and her delegates are concerned.

It follows that this appeal is dismissed.

THE STATUTORY HOLIDAY PAY DETERMINATION

The Delegate's Investigation

The Employer's payroll records produced as a result of the delegate's Demand for production also indicated that the Employer failed to pay 17 employees statutory holiday pay in accordance with the applicable provision of the *Regulation* (section 36.1). Accordingly, a determination was issued in the total amount of $371.49 reflecting unpaid statutory holiday pay owed to the employees in question.

In addition, the delegate levied a $0 monetary penalty and advised that further contraventions of the *Regulation* could result in a cancellation or suspension of the Employer's farm labour contractor's licence.

The Employer's Appeal

The Employer appeals the determination on the ground that the Director's delegate erred in law but, at the same time, does not indicate how the delegate misapplied the relevant provision of the *Regulation.*

Once again, the Employer argues that the entire agricultural sector is fraught with fraud and bogus record-keeping and wishes to use this appeal as a public forum to "expose" this alleged activity.

I can only reiterate my earlier comments with respect to the other two appeals. If the Employer wishes to engage in a political debate, an appeal to the Tribunal is not the appropriate forum to do so. The simple fact is that this Employer failed to comply with section 36.1 of the *Regulation* and, in light of that uncontested fact, a determination was issued so that the employees in question could be paid the amounts properly due and owing to them.

This appeal is dismissed.

ORDER

Pursuant to subsections 114(1)(c) and 115(1)(a) of the *Act*, I order that these three appeals be dismissed and that each of the determinations be confirmed as issued. The respondent employees are also entitled to any further section 88 interest that may have accrued since the date of issuance of the determinations.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal