

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- by -

Saboka Farm Inc
("Saboka" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/53

HEARING DATE: April 20, 1998

DECISION DATE: June 9, 1998

DECISION

APPEARANCES

Mr. Pargat Sidhu	on behalf of Saboka
Mr. Gurmail Sing Birkon	behalf of himself and Mrs. Birk
Mr. Jim Walton	on behalf of the Director
Ms. Dhaliwal	
Mr. Inderpal S. Mangat	interpreter

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on January 26, 1998 which determined that Saboka was liable for unpaid wages, statutory holiday pay, vacation pay, and for unauthorized deductions from wages to Mr. Gurmail Birk and Ms. Manjit Birk (the “Employees” or the “Complainants”).

The Director’s delegate found that Mr. Birk was owed \$8,516.33 and Mrs. Birk \$9,880.78, for a total of \$18,397.11. The Determination, and the attached Reason Schedule, set out the at great length, and in great detail, the findings of the delegate. Briefly, the delegate’s findings may be summarized as follows:

- Mr. Birk was owed wages. The Employer provided cheques made out to him in the amounts of \$5000.00 (October 22, 1996), \$1,285.00 (October 29, 1996) and \$200.00 (March 17, 1997). The delegate accepted the Complainant’s statement that the Employer took back the \$5,000.00 after the cheque had been cashed on October 22 for taxes and other benefits.
- Mrs. Birk was owed wages. The Employer provided cheques made out to her in the amounts of \$6,000.00 (October 11, 1996) and \$200.00 (March 17, 1997). The delegate accepted the Complainant’s statement that the Employer retained the \$6,000.00 after the cheque had been cashed on October 24 for taxes and other benefits.
- The Employer also provided a receipt in the amount of \$3,883.00 for “cash and groceries”. The Complainants denied receiving this amount in cash or groceries or at all. The delegate accepted the Complainants’ statements.

- The delegate did not accept the Employer's statement that it was paying vacation pay by adding two hours wages at straight time to the Employees' earnings. The delegate was of the view that the Employees, in fact, worked overtime and that the hours indicated on the payroll records did not represent vacation pay. In the result, the employees were entitled to vacation pay, at the rate of four (4) per cent on their earnings of \$8,736.00, or \$349.44 each.
- The delegate found that the Employees were entitled to pay on account of five statutory holidays each, for a total of \$420.00 each.
- With respect to overtime, the Employees' records were incomplete and they accepted the Employer's records.
- The delegate accepted the employees' version of the facts and found that the Employer had made unauthorized deductions when it retained \$5,000.00 on October 22, 1996 (Mr. Birk) and \$6,000.00 on October 24, 1996 (Mrs. Birk)

The Employer argues that the Determination is wrong. The Employer says that the two Employees were, in fact, paid all wages owing except a minor balance.

ISSUE TO BE DECIDED

The overall issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determination. In my view, this case does not turn on issues of law, rather it boils down to a choice between two competing versions of the facts: between the Employer which says it paid and the Employees who say that it did not. Most of the material facts in this case are in dispute.

FACTS

The Employer has operated a farm since 1983. Mr. and Mrs. Birk were both employed as farm workers. They worked for the Employer between April 28, 1996 and October 26, 1996. They lived on the farm in a cabin owned by the Employer. There were some 80 employees who worked on the farm.

1. Wage reconciliation

A useful starting point for dealing with the facts is the wage reconciliation, submitted by the Employer at the hearing. The Employer accepted the truth of the contents of this document which represents that the earnings of the Employees were disbursed as follows:

Mr. Birk

Gross wages (including vacation pay)	\$8,736.00
Less C.P.P.and U.I.	\$ 457.00
Net wages	\$8,279.00
Plus 3.6 per cent statutory holiday pay	\$ 298.04
	\$8,577.04

Less payments

Cheque (October 22, 1996)	\$5,000.00
Cheque (October 29, 1996)	\$1,285.00
Cheque (March 17, 1997)	\$ 200.00
Paid cash (October 27, 1996)	\$1,794.00
Balance payable	\$ 298.00

Mrs. Birk

Gross wages (including vacation pay)	\$8,736.00
Less C.P.P.and U.I.	\$ 457.00
Net wages	\$8,279.00
Plus 3.6 per cent statutory holiday pay	\$ 298.04
	\$8,577.04

Less payments

Cheque (October 22, 1996)	\$6,000.00
Cheque (March 17, 1997)	\$ 200.00
Paid cash (October 27, 1996)	\$2,089.00
Balance payable	\$ 288.00

It is apparent that earnings and payments do not reconcile.

2. Earnings during the period of employment

The Employer states that employees were paid on an hourly basis. The Employer agrees with the following description from the Determination (except “that he never said he could not afford to pay the employees”):

“... He maintains that the complainants worked forty-six hours per week and that he added two hours of wages to payroll records each week as vacation pay. He also states that he cannot afford to pay for statutory holidays, nor can he afford to pay semi-monthly. He also states that he has told his employees not to work overtime because he cannot afford to pay them.”

In cross examination by Mr. Walton, Mr. Sidhu admitted that the two hours added (to the 46) amounted to more than minimum wage plus 4 per cent, but explained that it was easier and required less paper work. In my view, the Employer's explanation is not credible. It is not inherently more complicated to add a percentage than to add two hours' wages at straight time.

The payroll record, submitted by the Employer with respect to Mr. and Mrs. Birk, indicated a total of 46 hours worked per week, consisting of 8 hour work days Monday through Friday and 6 hours on Saturday. It indicated, as well, that their pay rate was \$7.00 per hour. Based on the Employer's records, the Birks each earned \$8,736.00 between April 28 and October 26, 1996. The records also indicated bi-weekly payments, contrary to the actual state of affairs.

Mr. Birk stated that he and his wife worked 10-12 hour days without days off. However, as mentioned above, according to the Determination, they agreed with the hours set out in the Employer's payroll records. The Birks did not appeal the Determination. In the result, I am prepared to accept these hours at the basis for the decision.

3. Groceries and cash during the period of employment

The Employer claimed to have deducted \$3,883.00 from the Employees' earnings on October 27, 1996 on account of groceries, clothing and cash.

Mr. and Mrs. Birk were not paid semi-monthly, as required by the *Act*. Instead, the Employer testified, they were paid in groceries, clothing, occasional cash upon request, and a lump sum at the end of the season. The Employer admitted paying the Employees in this manner. The Employer explained that this was the Employees' preference. The Employer's employees did not want to keep money in the cabin due to fear of theft, did not want to have bank accounts, or wanted to "hide money from relatives". In my view, the real rationale for this system was provided by the Employer:

"Unfortunately, in the career of farming, farmers do not get paid bi-weekly for their crops. Almost all of the money begins filtering in during the later months. In the meantime, we supply our employees with groceries or other necessities such as clothing....."

At the end of the season the employer deducted amounts for groceries and clothing etc. and paid the balance to the employees. The Employer explained:

"All expenses for employees groceries, telephone calls, and cash wages were accounted for at the end of the season and receipts were signed by all employees at the same time. It was difficult to get receipts signed on each occasion as the amounts were varying from \$5.00 to \$1,500.00 from time to time. This was all done in good faith between employer and employees."

I find it difficult to accept that the Employer would pay out money to its employees on account of cash without some form of record of amounts paid, let alone receipts.

Mr. Birk testified that they did not receive any money from the Employer during the season. Although the Employer, in its appeal, claimed that it had made given money to the Employees for various purposes, including \$1,500.00 allegedly given to the Birks in July, the Employer did not produce any documentary evidence to support this. Mr. Birk explained that it was Mr. Sidhu's rule to pay only at the end of the season. In my view, Mr. Birk's explanation appears credible, particularly given the Employer's statement, quoted above. On the balance of probabilities, I prefer the testimony of Mr. Birk that he and his wife did not receive any money from the Employer during the season.

Mr. Birk also explained that they did not get any groceries or clothing from the Employer. They spent their own money on these items which, among others, they purchased from a "mobile store" which came to the farm from time to time. The Employer did not produce any credible documentary evidence to support the purchases it claimed to have made on behalf of the employees or cash payments made to the Employees. There was no explanation of how the figure of \$3,883.00 was arrived at. There was no accounting for this amount. In a wage reconciliation statement, submitted by the Employer at the hearing, the Employer stated that \$1,794.00 was on account of Mr. Birk and \$2,089.00 was on account of Mrs. Birk. Again, there was no explanation for this. In cross examination by Mr. Walton, Mr. Sidhu admitted that he did not have any written authorization for the deductions. In the result, and apart from the fact that the *Act* requires wages to be paid in a certain manner (see Section 20 of the *Act*), I do not accept the Employer's explanation on this point. I find that the Employer did not have any basis for deducting the \$3,883.00 from the Birks. In the result, on the balance of probabilities, I do not find the Employer's wage reconciliation believable.

4. October 22, 1996: Mr. Birk

On October 22, 1996, Mr. Birk testified, Mr. Sidhu took Mr. Birk and other employees to the Bank of Montreal. Inside the bank, Mr. Sidhu gave the employees, including Mr. Birk, a cheque for \$5,000.00 which they cashed. The Employer then took the money back for taxes and "government money". After that they went to the Khalsa Credit Union where Mr. Sidhu, according to Mr. Birk, deposited the money. Mr. Braich went with Mr. Sidhu into the Credit Union. Mr. Birk did not go with him.

The Employer agrees that he took the employees to the bank. Mr. Sidhu says he took them there, gave them the cheques which they cashed. He does agree not that he took back the money for deductions. He denies that he went to the Credit Union. He also does not agree that he took them to the Credit Union. The cheques, each for \$5,000.00, dated October 22, 1996, issued to Mr. Birk, Mr. Gurdev Pandher, Mr. Tara Singh Kandhola and Mr. Jagtar Sing Sandhu appear to have been

cashied at the Bank of Montreal on October 22. However, the cheque issued to Mr. Atma Singh Braich was not cashied at the bank but deposited at the Khalsa Credit Union on the same date.

On the balance of probabilities, and considering the entire evidence submitted by the Employer, including the wage reconciliation, I prefer the testimony of Mr. Birk over that of Mr. Sidhu. In brief, I accept Mr. Birk's testimony that the Employer took back the \$5,000.00.

5. October 24, 1996: Mrs. Birk

On October 24, 1996, Mrs. Sidhu, Mr. Sidhu's wife, took Mrs. Birk to the bank. Mrs. Sidhu gave her a cheque for \$6,000.00 which was cashied at the bank. The money was placed in a n envelope and given to Ms. Sidhu. Mrs. Sidhu explained that the money was for "for taxes". After the bank, they went to the Khalsa Credit Union, where, Mr. Birk stated, Mrs. Sidhu deposited the money.

With respect to this incident, Mr. Sidhu says that he took Mrs. Birk to the bank himself and that he brought her directly back to work and not to the Credit Union. The cheque to Mrs. Birk, dated October 11, 1996, was cashied on October 24, 1996.

Mr. Birk testified with respect to his wife. The Employer did not object to this. However, the direct evidence of a witness under oath or affirmation is to be preferred over the hearsay evidence of another witness. However, in this case, on the balance of probabilities, and considering the entire testimony of the Employer, including the wage reconciliation, I do not accept Mr. Sidhu's testimony with respect to Mrs. Birk. In effect, this leaves me with the findings of fact set out in the Determination.

6. October 26, 1996 and final payments

On October 26, 1996, the Birks were supposed to "settle their accounts" with the Employer. Their daughter and son-in-law came to the farm to pick them up. Mr. Sidhu was not at home and they asked his wife to deal with the matter. She told them that the matter could be settled later and they would get a cheque in the mail. The Birks left Saboka on October 26. On November 14 they received a cheque for \$1,285.00.

Subsequently, Mr. Birk testified, he telephoned the Employer numerous times but that the Employer explained that the "crops were not good". Nevertheless, the Employer agreed to send a T-4 slip and the balance owed. On March 17, 1997, the Birks received a cheque for \$200.00 each. The Birks were surprised due the small amount. They had worked hard. Moreover, they noticed that the T-4 slip did not include any taxes deducted. The Employer denied that he had agreed to deduct income tax. He stated that he remitted for U.I. and C.P.P. However, the amended T-4 slip, submitted by the Employees, and obtained by them from Revenue Canada, does not indicate that the Employer remitted any money on account of U.I. and C.P.P.

In all of the circumstances, where there is a conflict in the evidence, I prefer the testimony of Mr. Birk to that of Mr. Sidhu.

7. Written statements

The Employer submitted a number of statements which appeared to be signed by current and former employees. I place no weight whatsoever on these statements. Aside from the difficulty in verifying the identity of the individuals, the voluntary nature of the statements, and whether they understood what they signed, the statements are hearsay where submitted for the truth of their content. Such statements are inherently unreliable as the statements are not made under oath or affirmation and the individuals making them are not available for cross examination.

I give no weight to a “note” written on a copy of the cheque issued to Ms. Birk. This note, apparently written by an employee at the Employer’s bank, and dated February 20, 1998, purported to support the position that the money was given to Mrs. Birk. If the Employer wanted to rely on this evidence, which clearly is on a crucial point, the bank employee should have been called at the hearing to give evidence under oath and subject to cross examination..

ANALYSIS

With respect to the Birks’ earnings, I am satisfied that they earned the amount set out in the Determination. I am also satisfied that the Employer did not, in fact, supply groceries, clothing and cash to the Employees during the season and, therefore, aside from Section 20 of the Act, that the amount of \$3,883.00 was improperly withheld by the Employer. I am also satisfied that the Employer took back or retained money given by cheque on October 22 and 24, 1996.

I agree with the Determination that the Employer’s conduct contravenes Sections 18, 20 and 21 of the *Act*. Section 18(2) provides that the Employer must pay an employee within six days after the employee terminates the employment. Clearly, the Employer did not pay as required. Section 20 mandates certain methods of paying wages, including in Canadian currency, by cheque or, if authorized by the employee or a collective agreement, direct deposit. Even if I accepted the Employer’s explanation regarding payment of wages in groceries and clothing, such method is not sanctioned by the *Act*. Employees are entitled to be paid wages in a manner sanctioned by the *Act*. In this case, in any event, there was no credible evidence that the Employees had, in fact, been paid in the manner explained by the Employer. Moreover, Section 21 proscribes unauthorized deductions from wages. In my view, the deduction of the \$3,883.00 from the Birks’ wages contravenes Section 21. Similarly, the Employer taking back or retaining the \$5,000.00 and \$6,000.00 on account of “government money”, contravenes, at the very least, Sections 18 and 21.

With respect to vacation pay, I do not accept that the Employer paid vacation pay by adding an extra two (2) hours to the regular hours. Under Section 58 of the *Act*, an employer is required to pay vacation pay at the appropriate rate, in this case four (4) per cent.

With respect to statutory holiday pay, Section 46 of the Act provides that where an employee works on a statutory holiday, the employee is entitled to be paid 1 1/2 times the regular wages plus another day off with pay. In this case, the Employer did not dispute that statutory holiday pay was owing.

The appellant bears the onus of proving that the determination should be set aside. This applies particularly with respect to Mrs. Birk, who did not testify at the hearing. I am not persuaded that the Determination should be set cancelled or varied.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January 26, 1998 be confirmed in the amount of \$18,397.11 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal