

An appeal

- by -

Western Pacific Silviculture Company Ltd.
("WPS")

- 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: David B. Stevenson

FILE No.: 2003A/178, 2003A/179, 2003A/180,
2003A/181 and 2003A/191

DATE OF DECISION: October 29, 2003

DECISION

APPEARANCES

Brad K. P. Chudiak, Counsel and Karanjit Lidder	on behalf of Western Pacific Silviculture Company Ltd.
Jasvir Singh Aulakh	on his own behalf
Kuldeep Singh Mallhi	on his own behalf
Barinder S. Mahil	on his own behalf

OVERVIEW

This decision addresses five appeals brought under Section 112 of the *Employment Standards Act* (the “Act”) by Western Pacific Silviculture Company Ltd. (“WPS”) of five Determinations that were issued on May 16, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determinations found that WPS had contravened Part 3, Sections 17 and 18, Part 4, Section 40 and Part 7, Section 58 of the *Act* in respect of the employment Sarbjit Gill (“Gill”), Jasvir Singh Aulakh (“Aulakh”), Kuldeep Singh Mallhi (“Mallhi”), Ranjit Singh Dhillon (“Dhillon”) and Barinder S. Mahil (“Mahil”) (collectively, “the complainants”) and ordered WPS to pay the following amounts:

- \$5,367.03 to Gill;
- \$3,447.67 to Aulakh;
- \$3,447.67 to Mahli;
- \$2,886.23 to Dhillon; and
- \$3,364.25 to Mahil.

WPS says the Director committed several errors of law in the Determinations and failed to observe principles of natural justice in making the Determinations.

As the Determinations, and each of the appeals, are based on a common factual matrix and the claim of each complainant is related to, and to some extent dependent upon, the claims of the others, it is appropriate that the appeals be considered together.

As all the appeals raised an issue of credibility, the Tribunal decided that an oral hearing was required to ensure the parties a fair hearing. Three of the five complainants appeared at the hearing. Each of those who appeared was representing their own interests.

I heard evidence, some of it through an interpreter, from Ranbir Sekhon (“Sekhon”) and Kulwant Brar (“Brar”), both foremen for WPS, Jaswinder Parmar (“Parmar”) and Kashmir Kundi (“Kundi”), employees of WPS, Karanjit Lidder (“Lidder”), one of the owners of WPS, Murray Gurney (“Gurney”) and one of the complainants, Aulakh.

ISSUE

The issue raised in each of the appeals is whether WPS has shown an error in any of the Determinations that would justify the intervention of the Tribunal to vary or cancel any of the Determinations or refer the matter back to the Director.

THE FACTS

WPS is a silviculture company. For many years they have been in the business of planting trees in and around Quesnel – the Determination notes WPS had done work for West Fraser Mills for 25 years. Each of the complainants was employed by WPS in May and June of 2002 as tree planters¹. Only Dhillon had any previous experience as a tree planter. The complainants were employed on a piece rate basis. The complainants worked together as a planting crew.

On, or about, June 8, 2002 the complainants were dismissed for stashing trees, which is a term describing the act of burying large numbers of seedling trees and claiming payment as though they had been properly planted. WPS withheld each of the complainants last two weeks' wages. Mahil filed a complaint with the Director on June 24, 2002. Aulakh, Mallhi and Dhillon filed complaints on November 19, 2002. Gill did not file a complaint, but was added because he was included as a defendant in a legal action threatened by WPS against the complainants and had apparently expressed that he wanted to be included with the others in the Director's investigation.

During the investigation, WPS made the following allegations against the complainants:

- Ranbir Sekhon caught Mahil stashing trees;
- Gill had told Kulwant Brar that he, and the whole crew (all of the complainants), had been stashing trees; and
- Mahil was dismissed from subsequent employment with Fir Ridge Contracting for stashing trees.

The Director indicated that he wished to interview Mr. Sekhon and arranged to have that done in March 2003. The Determinations include the following discussion of an interview with Mr. Sekhon:

Ranjit Sekhon says he was the supervisor who caught Barinder Mahil in the act of stashing. He says he hid behind a tree and watched it happen. Then he says he didn't confront Mr. Mahil right away, but waited until later to talk with him. Why would he do that? Why would he not confront him right away when the alleged evidence is clearly revealed?

The other interesting point in regards to Mr. Sekhon's evidence is that the employer, then later the Employer's Lawyer, then later yet Mr. Sekhon himself, all said they would have Mr. Sekhon's written statement delivered to the Officer. After repeatedly requesting it and waiting for over four months, it can only be concluded that it will not be coming. The lack of action to support his verbal statements does not seem consistent.

The record contains no notes of the interview of Sekhon.

¹ A few of the complainants also worked some time in April 2002.

An affidavit from Sekhon was filed with the appeals and he gave evidence at the appeals hearing. His evidence essentially affirmed what he had told the Director. He said he saw Mahil one day; he could not remember what day or the date; he referred to it as the “last day”; he saw Mahil take some trees and walk, looking around; he followed and watched; he saw Mahil making motions that appeared as if he was digging; it appeared that Mahil was placing something in the ground; when Mahil left, he went to the spot and dug up many trees; he took some of the trees. He said he later found Mahil and told him he couldn’t plant anymore, he was stashing trees. He then talked with the owner, Karanjit Lidder, and the others were terminated the next day.

The Determinations also refer to the information attributed to Kulwant Brar and indicates that Brar was interviewed by another Officer. The record includes an e-mail message created by that Officer of her interview with Brar. It is unclear from the Determinations or the record whether the interview of Brar by the Officer took place in person or over the telephone. The Determinations include the following discussion of the information provided by Brar:

Mr. Brar reported that he remembered all of the 5 complainants, as well as another first year worker by the name of Karnail, who was also involved in the stashing. According to the Interpreter, Mr. Brar didn’t exactly say that he saw them stashing trees, but did say he was the one who caught the men stashing trees. He says he dug up the stash after he became suspicious.

Mr. Brar also claimed that, after they found the stashed trees, each member of the crew admitted they had been stashing and said they had made a mistake. He specifically named Sarbjit (Gill), Jasvir (Aulakh), Binnu (Barinder Mahil), and (Kuldeep) Mallhi. He stated they all confessed to him personally.

When asked if Sarbjit told him about anyone stashing Mr. Brar didn’t give a straight answer, but instead said something about Sarbjit had wanted to be paid. . . . When asked if any other employees ever told him that members of this crew were stashing, he responded by saying no, he caught them himself, and he didn’t need any other employees to tell him they were stashing trees.

At the appeals hearing, Brar said that all of the complainants had not confessed to him personally. He said that Gill told him he was stashing trees; Gill said where the stashes were; Brar got angry and told Gill to leave right away; Gill said he was not the only one; the next day Brar and others searched that area; they found two stashes, totalling approximately 500 – 600 trees. He said he asked Aulakh, Mahlli and Dhillon if they were stashing trees; they said, “no, they were not”; they said “catch us”. He gave evidence about a conversation with Mahil sometime after the crew had been fired. He said Mahil came to his house at about 2 am one morning; he had been drinking; he told Brar that he had “made a mistake”, that he was stashing trees, but was not the only one, all the crew was. Brar said he told Mahil that if he gave the names of all those who were stashing, he would get his money, but Mahil said he wouldn’t do that.

The Director found the evidence supplied through Sekhon and Brar to be “inconsistent and contradictory” and insufficient to prove any of the complainants were guilty of stashing trees.

Jaswinder Parmar gave evidence. He said he shared rooms with Brar and some others in 2002. He was in his bedroom; it was the middle of the night; he overheard a conversation from outside his room between Mahil and Brar; he doesn’t recall much of the conversation, but recalls that Mahil said, “our whole crew was stashing trees”; that Mahil was asked by Mr. Brar to say who stashed the trees, but would not because, “the rest would get mad with me”. The information provided by Parmar was not given to the Director during the investigation.

Murray Gurney appeared as a representative of Fir Ridge Contracting, another silviculture company in the Quesnel area. Gurney described how Mahil was caught stashing trees and fired from Fir Ridge after three days of employment. This information was given to the Director by WPS during the investigation but no reference to it is found in the Determinations and it does not appear the Director had any discussion with any representative of Fir Ridge about that information.

The Director accepts that stashing was taking place. Lidder described the scope of the stashing and its impact on WPS's business in 2003. He gave detailed evidence of the findings that resulted in WPS being fined almost \$2000.00 and being disqualified from doing certain work for West Fraser Mills for three years. In Unit 225B, WPS claimed to have planted 61,805 trees. West Fraser Mills, for whom they were contracting, indicated that was too many trees for that Unit and did what might be described as an "audit" of that Unit. This essentially involves re-measuring the Unit, re-plotting within the Unit and re-counting the trees within selected plots. West Fraser Mills did 82 plots in the Unit, finding 538 trees. Using those figures, West Fraser Mills calculated WPS had claimed payment from West Fraser Mills for more than 4000 trees that were not planted. Lidder speculated that number of trees, at least, had been stashed by the complainants in Unit 225B. He also speculated that similar numbers of trees had been stashed by the complainants in other Units, although there is no direct evidence showing any trees had been stashed in any Units other than 225B and the one in which the complainants were working on their last day. Sekhon, Parmar and Brar spoke of finding a total of about 1200 – 1500 stashed trees in those two Units.

Aulakh was the only one of the complainants to give any evidence. He said he was not stashing trees. He knew, because he was told when he started working for WPS, that if one member of the crew was caught stashing trees the whole crew would be fired.

ARGUMENT AND ANALYSIS

The burden is on WPS, as the appellant, to persuade the Tribunal that the Determinations were wrong and justify the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a Determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

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 made.*

In the appeals, WPS says the Director erred in law, including failing to apply the law of agency to the circumstances, failing to observe principles of natural justice, failing to properly investigate or analyze evidence; failing to appreciate the significance of evidence, placing the onus too high and failing to provide reasons.

In reply to the appeals, the Director submits there is no basis in the *Act* for applying “agency” principles to the individual claims of the complainants. The complainants cannot be held responsible for the inappropriate actions of others, even if it were proven that any of the complainants acted inappropriately. The Director says all of the allegations made against the complainants, individually and collectively, were put to the complainants for their response. The complainants denied every allegation made. The ability of the Director to ask more specific questions was impeded by not being provided with more complete, accurate or specific allegations. The Director submits that the evidence of Parmar is not “new”; WPS could have and should have provided that information during the investigation.

WPS argues that a proper analysis of the evidence given at the appeals hearing establishes, on a balance of probabilities, that all of the complainants were stashing trees. The following points of the evidence are referred to:

- Sekhon’s uncontradicted evidence about seeing Mahil stashing trees;
- Brar’s uncontradicted evidence about being told by Gill he, and all the crew, were stashing trees and being told by Mahil that he, and all the crew, were stashing trees;
- Gurney’s uncontradicted evidence about Mahil being fired from Fir Ridge Contracting for stashing trees;
- Mahil’s failure to testify;
- The evidence of finding trees was consistent with the trees being planted “in a line”;
- The evidence that the complainants were inexperienced and had to be told frequently they were not planting enough trees in a plot, taken with the observations made by Sekhon, Brar and employees of West Fraser Mills about the actual numbers of trees being planted by the complainants’ crew are inconsistent with the complainants planting as many trees as the experienced crew or as many as they claimed.

WPS says the real issue is not so much whether the complainants stashed trees as what the effect of stashing trees should be on their complaints or on what they are entitled to be paid for the work done. In making this point, PWS concedes the complainants worked and are entitled to be paid wages. They are not, however, entitled to be paid piece rate for trees that were stashed, and not planted, and if a piece rate wage cannot be determined, the complainants should only be entitled to receive minimum wage.

It would be appropriate at this point to indicate that whether trees were stashed is not an issue. It is accepted that there is ample evidence of trees having been being stashed. The evidentiary issue is whether, on balance, there was proof that any or all of the complainants were stashing trees.

I agree with the Director that the circumstances of each of the complainants must be assessed individually. If I were to conclude that one or two of the complainants were stashing trees, that does not

entitle me to conclude the others were also stashing trees. It is not a question of “agency” at all; it is a question of burden of proof. The only “proof” that has been advanced for asserting that Aulakh, Mallhi and Dhillon were stashing trees comes from statements allegedly made by Mahil and Gill to Sekhon and Brar, to the effect that all the crew was stashing trees, taken together with the suggestion that because of the proximity of the members in each crew to one another, it is improbable that one member of the crew could be stashing trees without the others knowing it.

The former statement, however, is pure hearsay against Aulakh, Mallhi and Dhillon, uncorroborated by any other evidence and denied by those complainants. It is generally accepted that crucial and central issues of fact may not be established on uncorroborated hearsay evidence and, except in exceptional circumstances that do not exist here, hearsay evidence is not to be preferred over direct evidence. In respect of the latter statement, that suggestion may be a valid observation, but it does not compel a conclusion that all of the complainants were engaged in stashing trees. The complainants denial of any knowledge of members of their crew stashing trees is equally consistent with two other conclusions as with the conclusion they were participating in stashing – first, they knew if they admitted knowledge of one of the crew stashing trees, they would all be fired; and second, they didn’t want to be seen “ratting” on one of the crew.

I am troubled that only Aulakh gave any evidence at the appeal hearing. On the other hand, the burden is on WPS to show an error in the Determinations. At the end of the day, I cannot say that has been done for the Determinations relating to Aulakh, Mallhi or Dhillon.

I am also troubled by the inconsistencies in evidence given by Brar during the investigation, in the appeals and at the appeals hearing. There is no doubt in my mind he told the Officer who interviewed him that all had admitted stashing trees. The e-mail communication from the Officer attributes the following statement to Brar, “they all admitted it after they found the stashed trees and all stated they made a mistake - he named Sarbjit, Jasvir, Binnu, Mallhi. Said they all may deny it now but they did admit it at first”. It should be noted that the Officer was interviewing Brar in his first language and not through an interpreter, although she undoubtedly translated the conversation for the benefit of the Director. As a result, his attempt to distance himself from those statements in the affidavit he swore for the purposes of the appeals, raises concerns about the affidavit. As well, in paragraph 16 of his affidavit, Brar implies that none of the crew denied stashing trees, but at the appeals hearing, he was asked whether he asked Aulakh, Mallhi or Dhillon if they were stashing trees and he replied, “they said no, they were not”.

In any event, Brar’s evidence against Aulakh, Mallhi and Dhillon is nothing more than hearsay, which is not elevated by Parmar’s evidence of having overheard part of a conversation between Mahil and Brar.

On the other hand, it is not apparent why the Director would reject the statement of Sekhon that he saw Mahil stashing trees. The Director seems to have rejected that statement on nothing more than an indirect inference arising from questions about why Sekhon did not confront Mahil right away with what he had seen – “Why would he do that? Why would he not confront him right away when the alleged evidence is clearly revealed?”. My question has to be, why didn’t the Director raise those concerns with Sekhon when he was interviewed? I recognize it can be difficult to interview a person whose first language is not that of the interviewer, but in my view that fact requires more attention to apparent inconsistencies that might arise from a misunderstanding of either the question or the response. It was apparent from his evidence at the appeals hearing, that Sekhon did not confront Mahil right away because he wanted to confirm what Mahil had done and so waited until he had left before going to where Mahil had been and

uncovered the stash of trees. Because of this sequence of events, Sekhon was unable to talk with Mahil until “later”.

My second question would be whether, even if Sekhon did not confront Mahil until later, Mahil was told he was being fired for stashing trees and, if so, what his response was. The Determination for Mahil says only that:

The Complainant claims that no one ever caught him stashing trees and he never said that he or anyone else was, to anyone. He does not understand why the employer is not paying him.

The material on record clearly reveals, however, that Mahil was told he was being fired for hiding trees. In his complaint, filed with the Director on June 24, 2002, Mahil indicated his last day of work was June 7, 2002 and in the section reserved for detailing his complaint stated, in part:

They fired me because they said that I was hiding trees and not planting all the trees given to me.

The Determination and the record do not indicate the Director ever asked Mahil to relate the circumstances of his being fired. The obvious questions would be: who fired him; when; where; what was said by the person or persons firing him; what did he say and do when told he was fired; were there any witnesses to the discussion; why did he say or do those things; and did he say and do anything later that would be either consistent or inconsistent with his version of events, for example, did he immediately contest the reasons for his firing or did he do nothing.

In their complaints, Aulakh, Mallhi and Dhillon each indicated his last day of employment with WPS was June 8, 2002. Each alleged they had quit, because they were not being paid on time. The assertion that each of those individuals quit for the stated reason is not consistent with any of the evidence. Rather, the weight of the evidence indicates that Aulakh, Mallhi and Dhillon were terminated for reasons relating to stashing trees. In particular, Aulakh said in his evidence that when Brar told them not to go to work, they asked why and Brar replied saying “the crew is stashing trees”. There is no indication any of them questioned that response. The decision to terminate Aulakh, Mallhi and Dhillon came through Lidder and was, on my view of the evidence, based entirely, or predominantly, on the policy of terminating the entire crew (and withholding any wages owing) if one of that crew is caught stashing trees.

On the evidence, the only logical explanation for WPS terminating Aulakh, Mallhi and Dhillon was that someone on their crew was caught stashing trees. According to the statement in his complaint, that was Mahil, who says he was fired on June 7 for “hiding trees”. Of some note is that, unlike the reason given to Aulakh, Mallhi and Dhillon by Brar – “the crew was stashing trees” – the statement in Mahil’s complaint is personalized – “I was hiding trees”. I am not suggesting that Mahil at any time admitted to hiding trees, quite the opposite, he has denied it. But in the face of the evidence, as equally confusing as why Sekhon’s evidence of seeing Mahil stashing trees would be rejected, is why Mahil’s statement that “no one ever caught him stashing trees” would be accepted without some explanation being provided by him and the reasons explained in the Determinations. He admits he was fired for hiding trees. He has never acknowledged the circumstances of his firing, that he was fired by Sekhon for hiding trees or what his response to his firing was.

In the Determinations and in the response to the appeals, the Director has alluded to not being provided with Sekhon’s written statement. With respect, such a statement should not have been necessary. The Director interviewed Sekhon directly. It is probable notes of that interview were taken. If not, one wonders how fair a process could be that depended for its findings of fact on the Director remembering

details of all the evidence provided during the complaint procedure. No notes are included in the record. The Director says the Tribunal has never required officers to include every question and response that occurred during an investigation to be included in Determinations. That might well be an accurate statement as it related to appeals under the *Act* as it stood before November 30, 2002, but the appeal process has been amended effective that date. Among other things, the Director is required to provide to the Tribunal with a copy of the record, including any witness statements considered by the Director (Section 112(5)). There is nothing in that statutory obligation that confines the notion of witness statements to only written statements provided to the Director. A verbal statement provided to the Director by a witness, noted and considered by the Director when making the Determination is a witness statement which is required to be included in the record.

The Director has a statutory duty to give reasons (Section 81(1.3)). The failure to provide adequate reasons can have a significant impact on the right to appeal. Where the basis for the Determination is plain from the record, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the Tribunal would likely not intervene. On the other hand, where the path taken by the Director through confused or conflicting evidence is not at all apparent, the Tribunal may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the Determination properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support the Determination, the deficiencies in the reasons can amount to an error of law and justify the intervention of the Tribunal. While I affirm that the Director has considerable latitude in deciding to accept or reject evidence, in whole or in part, I also affirm that in doing so the Director must act judicially, and not arbitrarily or unreasonably, in weighing and assessing the credibility of the evidence. More specifically, the Director may not reject evidence on an important point without good reason, which must include a finding against the credibility of the evidence, an adequate explanation of why the evidence was found to lack credibility and some evidence found in the record to support that finding.

The reasoning found in Mahil's Determination is inadequate and neither the record nor the Determination provide a valid reason for the Director rejecting Sekhon's evidence about seeing Mahil stashing trees. These deficiencies are errors of law that justify the Tribunal's intervention under Section 115 of the *Act*.

Mahil also had an opportunity at the appeals hearing to respond to Sekhon's evidence. He chose not to testify. He is, of course, not required to testify and is entitled to rely on the burden placed on WPS to show an error in the Determinations. The evidence from Sekhon was particularly damaging to his claim, however, and required some response from him. He put to Sekhon during cross-examination that Sekhon was lying. Sekhon denied that allegation. He put Sekhon's credibility in issue and never followed up.

The appeal of Mahil's Determination is granted. I shall discuss the implication of this conclusion later.

Finally, I will consider the appeal of Gill's Determination. Gill did not attend the appeals hearing. Brar indicated during his evidence that he was incarcerated. That possibly explains his absence. To reiterate, however, the burden is on WPS to prove the Determination in his favour wrong in some way that justifies the Tribunal's intervention.

The difficulty for WPS in this appeal is that the best evidence of Gill stashing trees comes from an alleged admission he made to Brar. The circumstances in which he says Gill admitted to him that he and the others in the crew were stashing trees lacks credulity. Brar said he asked Gill one day (he did not

identify which day or even place it in a context), “Did you guys stash too many trees today?” and Gill responded by admitting he had stashed trees, that all the crew was stashing and told him where trees had been stashed. Brar said he got mad and sent him away. He said he searched the area described by Gill the next day and uncovered stashed trees. He never recorded this discussion, never recorded discovering the stash, or stashes, of trees he found nor, it appears, did he ever tell anyone else about Gill’s admission at the time it was made. Nor is there any evidence to support Brar’s contention that he told Gill to “leave right away”. Material in the record indicates that Gill’s last day of work, like Aulakh, Mahlli and Dhillon, was June 8. Like the others, he appears to have worked that whole day. His record shows eight hours worked and 1170 total trees planted – the same as Aulakh, Mahlli and Dhillon. There is something inherently improbable in Gill, at the same time, having been sent away and having worked a full day.

His statement to the Officer about what Gill said was ambiguous. His affidavit in this area is vague and contradicts his statement to the Officer. His testimony lacked the elements of reasonableness and conviction. Like the Director, I am not satisfied that his evidence can be trusted. Accordingly, there is no reliable evidence showing Gill was involved in stashing trees, and therefore no basis for disturbing his Determination. The appeal of his Determination is dismissed.

As indicated above, I will address the implications of my conclusion on Mahil’s Determination. There are two implications: the first relates to the amount of wages that are owed to him; and the second relates to how my conclusion might affect the amount of wages owed to the other complainants.

In respect of the first, as the Determinations indicate, it might be appropriate to calculate the wages owed to a complainant found guilty of stashing on the minimum wage for hours worked as the basis for a piece rate might not be verifiable. On the second, because the piece rate of all of the complainants was based on the daily total of the group divided equally among the crew, the daily totals for each member of the crew would be artificially inflated by the number of trees stashed and not planted.

On the evidence, WPS was able to identify approximately 5000 stashed trees, about 500 to 600 of which were attributed to the period for which the complainants were not paid. WPS attempted to show, through the evidence of Brar, Sekhon, Parmar and Kundi, that the complainants actual production was probably 20% below what was claimed. They failed to do so. The evidence provided was vague, impressionistic and occasionally conflicting; it not based on any actual records that related specifically to what the complainants’ crew had actually done (as opposed to what they claimed to have done), although I understood from the evidence that such records existed.

Brar testified generally about the work of the complainants. The objective of this evidence was to indicate the complainants could not, and had not, achieved the production levels claimed on the daily sheets. He said he had “plotted” the whole crew on a daily basis, meaning that he had viewed a number of plots (how many plots was not indicated) and had counted the number trees planted in each of those plots. He claimed the complainant’s crews averaged 5 to 6 trees per plot. He said he recorded these figures, but was unable to provide them. He said he had turned them in to the office. WPS did not provide those records. The records might have been helpful; they would at least have lent a degree of objectivity for the conclusions I was being asked to reach.

Sekhon was asked about the complainant’s production. Some of his evidence was inconsistent with what Brar had said and some was internally inconsistent. He also said he had examined some of the Units (blocks) the crew had planted. He was asked how the plotting was in these blocks, and replied some was OK, some was not. He was asked if some plots in the other blocks had six trees, he said yes, and some

had eight. He said overall, based on the plots he examined (he didn't say how many that was), the complainants' crew was averaging about 1200 trees per hectare, which is the amount that would be achieved based on an average of six trees per plot.

Lidder testified that when Unit 225B was re-plotted by West Fraser Mills, the 82 plots counted contained 538 trees, which is an average of more than 6.5 trees per plot. The re-plotting was apparently done in groups of between 7 and 15 plots. None of the groupings showed less than an average of 6 trees per plot and some of the groupings showed an average of more than 7 trees per plot. I appreciate that those figures probably included the work done in the Unit by both the complainant's crew and the more experienced crew, but being unable to identify and allocate particular work to the complainants is a considerable impediment to a finding consistent with the assertions being made by the witnesses for WPS.

The daily records do show that from about May 8 to June 8 the complainants' crew was consistently recording having planted approximately the same number of trees (an frequently more) on a daily basis as the more experienced crew when the two crews were in the same Unit. WPS says they should not have been able to do that. That might be so, but it doesn't tell me what they should have been able to plant on those particular day in those particular conditions. There was evidence that planting conditions may vary from Unit to Unit and within a Unit. I also appreciate that the learning curve for this type of work is not particularly long or steep.

Overall, I am not able to draw any firm conclusions from this evidence or say that it would be wrong to calculate most of the complainants' wages owed from the records provided, making some adjustment for the number of trees proven to have been stashed, recognizing that the *Act* is benefits conferring legislation and ought to be construed and applied in a manner that best protects the interests of the employees in its basic entitlements (see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). That would seem to suggest a need for clear and cogent evidence before an employee would be disentitled to wages presumptively earned.

The matter will have to be referred back to the Director. All of the Determinations must at least be revisited. I have set out some of the evidence and have expressed my view on other aspects of the evidence. That may be of some assistance to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated May 16, 2003 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal