Citation: Lazy F-D Ranches and Hay Sales Ltd. (Re)
2020 BCEST 110

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Lazy F-D Ranches and Hay Sales Ltd.

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2020/035

DATE OF DECISION: September 10, 2020

DECISION

SUBMISSIONS

Jason P. Koshman	counsel for Lazy F-D Ranches and Hay Sales Ltd.
Michal Kozisek	on his own behalf
Ramona Muljar	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act ("the ESA*") Lazy F-D Ranches and Hay Sales Ltd. (the "Employer") has filed an appeal of a determination issued by the Director of Employment Standards ("the Director") on January 17, 2020 (the "Determination"). In that Determination, the Director found that the Employer had contravened sections 21, 40, 45/46, 58 and 63 of the *ESA* in failing to pay a former employee, Michal Kozisek (the "Employee"), overtime, statutory holiday pay, annual vacation pay and compensation for length of service, and for making unauthorized deductions from the Employee's pay. The delegate ordered the Employer to pay $53,343.98, including interest. The Director also imposed nine administrative penalties for the contraventions, for a total amount owing of $57,843.98.

2. The Employer's appeal is on the sole issue that the Director erred in law in his interpretation of "farm worker" as defined in the *Employment Standard Regulation* (the "*Regulation*").

3. After receiving the appeal, the Tribunal requested the section 112(5) record from the Director. On March 23, 2020, the Director submitted a redacted copy of evidence that had been submitted before the complaint hearing. The Director's delegate noted that phone call records that had been submitted by the Employee after the conclusion of the hearing were not included in the record, as they were not relied upon in making the Determination.

4. The Tribunal disclosed the record to the Employee and to counsel for the Employer and sought submissions on the completeness of that record.

5. The Employee objected to the completeness of the record and attached four mp3 files of the telephone recordings with his submission. The Employee said that he had provided the recordings to the Director during the complaint process.

6. The delegate acknowledged the omission of those recordings in providing the record to the Tribunal. She also acknowledged the omission of a one-page pdf document which the Employee had submitted with the phone records.

7. The Employer noted that the Employee's phone call records had never previously been disclosed to the Employer. Additionally, however, the Employer noted that the record contained 13 pages of post-hearing submissions that the Employee had provided to the delegate that the delegate did not expressly state

that she did not rely upon. The Employer contended that these post-hearing submissions, which had not been previously disclosed, constituted a denial of natural justice.

8. I accept the delegate's assertion that she did not consider or rely on the telephone recordings which were provided by the Employee almost one month after the complaint hearing. I have reviewed the 13 pages of post-hearing submissions. Of those pages, one page is a covering email, one is an Employee generated "list of documents for complaint hearing," and two pages relate to the Employer's true address. The documents include one page of assertions by the Employee regarding the reasons for his termination along with eight pages of documentation relating to his driving record and a criminal record check. Finally, the post-hearing submission also includes one page of the Employee's views on engaging an Immigration Advisor to assist with a Labour Market Impact Assessment ("LMIA").

9. I agree that it is troubling that if the delegate relied on these documents, and I can only infer from the submissions that she did, they were not disclosed to the Employer. Nevertheless, none of these post-hearing submissions relate in any way to the sole issue on appeal, which is the delegate's interpretation of section 1 of the *Regulation,* specifically, the definition of "farm worker." Consequently, I would not interfere with the Determination on this basis.

10. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I sought submissions from the Employee and the Director.

11. This decision is based on the submissions of the parties, the section 112(5) record that was before the delegate at the time the Determination was made, and the Reasons for the Determination.

FACTS

12. The Employer operates a farm in Knutsford, British Columbia. The Employee was employed as an Agricultural Equipment Technologist under a LMIA permit. The first LMIA expired in October 2017, and the second expired in July 2018. The Employee was employed from July 3, 2017, until January 8, 2019.

13. In his complaint, the Employee alleged that the Employer failed to pay him for all hours worked, including overtime; for making unauthorized deductions from his wages; and for failing to pay him compensation for length of service. The Employee also alleged that his employment was terminated because he had filed an Employment Standards complaint for unpaid wages. The delegate found insufficient evidence to support such a finding and the Employee has not appealed this finding. The delegate determined that the Employee was entitled to compensation for length of service as well as for unauthorized deductions from his pay. Neither of those findings are an issue in this appeal.

14. The Employee filed two complaints, the first on August 30, 2018, and the second on January 9, 2019. The delegate determined that the wage recovery period under section 80 of the *ESA* encompassed the period August 31, 2017, to January 8, 2019 inclusive.

Employment Contract

15. The parties entered into a written employment agreement, upon which the LMIA and the work permit were based. That agreement, which was drafted by an immigration consulting company, sets out the Employee's job duties as including, but not limited to:

- Check and inspect various types of agriculture equipment, including tractors, trucks, trailers, loaders, chainsaws and other agriculture equipment;
- Diagnose faults and malfunctions using computerized and other testing equipment and perform repairs adjustments and replacements as necessary;
- Test repaired equipment for proper performance…;
- Operate and perform routine maintenance work on agriculture equipment;
- Apply knowledge of agriculture equipment;
- Ensure that repairs remain within approved budget;
- Source and order parts needed for repairs and maintenance;

  Train and coach general ranch workers, seasonal workers and contractors working with or on this equipment; …
- Maintain accurate daily logs of inspections and completed work;
- Strictly follow all established safety rules and procedures;
- Perform other general ranch duties as required.

16. Both the permit and the employment agreement provided that the Employee was to be paid an hourly rate of $32. The employment agreement specified that the Employee was expected to work 40 hours per week, that he was to be paid on a two-week basis, and that he was to receive 4% vacation pay.

17. The Employer asserted that in May 2018, the parties agreed that the Employee's hourly wage rate would be reduced to $25. The Employee denied that he agreed to a wage reduction.

18. The delegate found insufficient evidence that the Employee agreed to a reduction to his hourly wage and determined that the Employee's hourly wage rate was $32 for the entire period of his employment. The Employer does not challenge this finding.

19. The Employee did not have a consistent work location. He worked at a number of the Employer's fields in the summer and travelled to different locations to repair and maintain farm equipment. He also renovated the Employer's residence during the winter. His hours of work varied greatly between summer and winter months. The Employee often worked seven consecutive days during the summer, while he sometimes worked only an hour or two a day in the winter.

20. The Employee was paid once per month and was always paid for 160 hours at straight time, regardless of the number of hours he had actually worked. The parties agreed that additional hours would be banked and paid out during the winter months. There was no written agreement regarding the time bank. In February 2018, the Employee asked to have his banked hours paid out. Initially, the Employer's payroll

administrator assured the Employee that the Employer was "working on it" but at the end of May, the Employer informed the Employee that he could not pay out the number of banked hours. As the Employee never received any wage statements, he was unable to verify the number of hours in his time bank.

21. The Employee submitted a monthly time sheet to the Employer on or after the 26th of each month. The timesheets recorded the tasks he performed on any given day, how long he took to complete all the daily tasks, as well as the total number of hours he worked that month. The Employer did not dispute either the Employee's identification of his tasks or his total hours worked, but argued that the Employee had not calculated his hours to take meal breaks into consideration. The delegate determined that, in the absence of any evidence that the Employee actually took breaks, the hours recorded by the Employee were a full and accurate description of the hours he worked. This conclusion is not disputed.

22. The wage rate, $32 per hour, was valid until the spring of 2018. The Employer contended that the quality of the Employee's mechanic work was unsatisfactory, but because he wanted to retain the Employee as an employee, in June 2018, the parties agreed the Employee's wages would be reduced to $25 per hour. The Employer did not submit any documentary evidence to this change, and could provide no witnesses to the conversation. The Employer emailed confirmation of the wage change to the Employee after the meeting. Included in the email was a recalculation of the Employee's wages. The Employer contended that, as a farm worker, the Employee was not entitled to overtime wages.

23. The delegate determined that although the Employer was an "agricultural operation," the Employee was not a farm worker. She noted that, according to the employment contract, the Employee was hired as an Agriculture Equipment Technician, and that his tasks were to inspect, test, maintain and repair agricultural equipment including tractors, trucks, chainsaws and loaders. The delegate found that these tasks were not included in the definition of "farm worker" as defined in section 1 of the *Regulation*.

24. The delegate also considered the timesheets submitted by the Employee outlining the tasks he performed each day - timesheets which the Employer agreed accurately represented the work performed by the Employee. She determined that "except for the summer months, the vast majority of the tasks the Complainant completed are related to the maintenance and repair of large-scale agricultural equipment." She then determined that:

> In the summer and fall months, when the farm was focused on harvesting crops, the Complainant did complete some work that can be characterized as clearing or cultivating land, or using farm machinery or equipment for the purposes of growing and harvesting the product of an agricultural operation (section 1.(a)(b)(c) of the Regulation). For example, in August of 2017, the Complainant worked a total of 30 days, out of which he spent 12 days doing work mostly related to the maintenance of machinery, 12 days doing work mostly related to harvesting activities, such as baling hay, and 6 days doing both of those things. In September of 2017, the Complainant worked a total of 27 days, spending 18 of those days doing mostly maintenance-related work, 5 days doing work mostly related to harvesting, and 4 days doing both. In October of 2017, the Complainant worked a total of 25 days, where 13 were spent doing work mostly related to equipment maintenance or farm renovations, 7 were spent doing work related to harvesting or cultivating land and 5 days were spent doing both. In the winter months of November, December, January, February and March, the Complainant was engaged in work mostly related to renovations around the farm, plowing snow, maintaining and repairing farm equipment, and miscellaneous small

> tasks and errand-running. In April of 2018, the Complainant worked a total of 22 days, with 13 of those days spent clearing land. In May of 2018, the Complainant worked 30 days, and spent 6 of those days clearing and cultivating land, 18 of those days doing equipment maintenance and other miscellaneous tasks, and six days doing some of both. In June of 2018, the Complainant worked a total of 23 days, 11 of which were used for work tasks mostly related to harvesting and seeding, 10 of which were used mostly for equipment maintenance and other miscellaneous tasks, and two of which were used for doing both. In July, the Complainant spent 14 days doing work mostly related to the maintenance of farm equipment, 4 days harvesting and cultivating land, and 10 days doing both. The following months adhere to the same pattern as the previous year, up until the Complainant's termination in January of 2019.

25. The delegate concluded that while the Employee did perform work tasks that "related to the harvesting and cultivation of land for an agricultural operation" when looking at his employment as a whole, she found that his principal employment activities did not consist of these tasks. The delegate concluded that the Complainant did not meet the definition of a farm worker and was not therefore excluded from the overtime provisions of the *ESA*.

26. The delegate calculated the Employee's hourly wage entitlement as well as his overtime wages based on the Employee's time sheets.

27. The delegate determined that the Employee was entitled to wages for work performed in November and December 2017, as well as January 2018, when he did not have a valid work permit. This conclusion is also not disputed by the Employer.

ISSUE

28. The sole issue on appeal is whether the delegate erred in law in concluding that the Employee was not a farm worker, as defined in the *Regulation*.

ARGUMENT

29. The Employer submits that the delegate erred by relying too heavily on the contractual documents and by conducting only a cursory review of the Employee's hours in arriving at a conclusion that the Employee was not a farm worker. The Employer argues that, rather than analyzing the substance of the work actually performed by the Employee, the delegate focused on the form and content of the Employee's contractual documents, including the LMIA and the "Employer letter."

30. The Employer also argues that when the delegate considered the substance of the work performed by the Employee as identified in the timesheets, she did so without any meaningful analysis, leading to an incorrect conclusion.

31. The Employer further argues that, in her analysis of the time sheets, the delegate focused on the task descriptors and did not analyze the actual hours worked in relation to those tasks. The Employer's position is that, based on a careful analysis of the time records, the Employee's tasks consisted of 80% farm work and 20% agricultural equipment maintenance work. The Employer also notes that, in his

complaint form, the Employee acknowledged that he did two types of jobs – farm work and agricultural machine mechanic.

32. The Employer says that, for example, according to the time sheets, of the 382 hours worked in August 2017, 147.5 hours on 12 days were worked exclusively as a farm worker performing tasks such as cutting, baling, hauling and loading and that only 6 days were spend exclusively on equipment maintenance. The Employer also says that many tasks which the Employee identified as maintenance duties, such as fueling and greasing their equipment, were also general duties performed by all farm workers as part of their employment responsibilities.

33. The Employer makes similar arguments for the Employee's recorded duties for other months.

34. The Employer argues that the Employee's *principal employment responsibilities* were those of a farm worker and that a worker's status is not defined by titles but by the actual work and functions performed.

35. The Director says that, based on the interpretive principles applicable to benefits-conferring legislation outlined in *Machtinger v. HOJ Industries* ((1992) 91 DLR (4th) SCC), any exclusions from the minimum requirements of the legislation should be narrowly construed. The Director also argues that the interpretation of "farm worker" must also take into account the purposes of the *ESA* outlined in section 2.

36. The Director notes that the Employee was hired as an agricultural technician, not as a farm worker. The Director submits that even though a large portion of the Employee's work duties did consist of farm work, his principal work responsibilities were those of an agricultural technician not those of a farm worker.

37. The Employee says that the only reason he distinguished between the two jobs in his complaint was that that the Branch employees who assisted him in filing his complaint suggested that he separate out his duties. He says that, had he believed it mattered, he would have recorded how many hours he worked as a mechanic and as a farm hand.

ANALYSIS

38. Section 112(1) of the *ESA* 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.

Error of Law

39. The Tribunal has adopted the following 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.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
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 method of assessment which is wrong in principle.

Statutory Provisions

40. Part Four of the *ESA* sets out minimum standards for hours of work and overtime wages. Part Five prescribes the statutory holiday entitlements of employees. Section 34.1 of the *Regulation* exempts farm workers from Parts Four and Five, except for the excessive hours provision of section 39. In short, the *Regulation* exempts employees who are farm workers from the *ESA's* minimum standards regarding overtime and statutory holiday entitlements.

41. Section 1 of the *Regulation* defines a farm worker as:

> a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of
>
> (a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,
>
> (b) clearing, draining, irrigating or cultivating land,
>
> (c) operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b), or
>
> (d) …

42. In *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), the Supreme Court held that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

43. The Tribunal has consistently applied this principle, strictly interpreting provisions that derogate from minimum standards. The Tribunal has found that to do otherwise would be inconsistent with the remedial nature of the *ESA.* (see section 8 of the *Interpretation Act*, R.S.B.C. 1996 c. 238, and *Rizzo and Rizzo Shoes*, [1998] 1 S.C.R. 27)

44. I cannot accept the Employer's argument that the delegate ought to have looked at the amount of time the Employee spent on each task in order to determine whether or not he was a farm worker. The

delegate's task was to interpret the *Regulation* to determine whether or not the Employee's "principal employment responsibilities" were as a farm worker.

45. Blacks's Law Dictionary defines "principal" as: "Chief; leading; most important or considerable; primary," while the Mirriam-Webster dictionary defines "principal" as "the most important, consequential, or influential".

46. The Employee worked for the Employer under a LMIA, which permits an employer to hire a foreign worker because no Canadian worker or permanent resident is available to do the job for which the employee is hired. Once the Employer obtains an LMIA, a prospective employee may apply for a work permit. Certain conditions, including the type of work an employee can perform, may be written directly into the work permit. (Section 185 of the *Immigration and Refugee Protection Regulations*)

47. There can be little doubt that the employment agreement was drafted to enable the Employer to obtain the LMIA. The reason the LMIA, and thus the work permit, were issued was because the federal government was satisfied no Canadian was available to perform the work of an agricultural technician.

48. While the evidence is that the Employee spent significant amounts of time, particularly in the winter, either not working or performing no mechanic duties, the *Regulation* does not prescribe the amount of time an employee spends on the tasks enumerated in the definition; rather the key is what the Employee's most important employment responsibilities were.

49. The only reason the Employer could have hired the Employee was because he had skills as a mechanic that no Canadian was available to perform. Therefore, I find no error in the delegate's conclusion that the Employee's principal, or most important, employment responsibilities were those for which the LMIA and permit were issued – that is, checking, inspecting and repairing agricultural equipment. I find no error in her conclusion that the Employee's principal employment responsibilities were not those of a farm worker, irrespective of the time he spent performing them.

50. The appeal is dismissed.

ORDER

51. Pursuant to section 115 of the *ESA*, the Determination, dated January 17, 2020, is confirmed in the amount of $57,843.98, together with whatever further interest that has accrued under Section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal