Citation: Lazy F-D Ranches & Hay Sales Ltd. (Re)
2021 BCEST 6

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Lazy F-D Ranches & Hay Sales Ltd.
("Lazy F-D")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft (Panel Chair)
Robert E. Groves
Shafik Bhalloo

FILE No.: 2020/140

DATE OF DECISION: January 13, 2021

DECISION

SUBMISSIONS

Jason P. Koshman	legal counsel for Lazy F-D Ranches & Hay Sales Ltd.
Ramona Muljar	delegate of the Director of Employment Standards

OVERVIEW

1. This is an application filed by Lazy F-D Ranches & Hay Sales Ltd. ("Lazy F-D") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2020 BCEST 110 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal confirmed a Determination issued against Lazy F-D on January 17, 2020, ordering it to pay the total sum of $57,843.98. The Determination was issued by Ramona Muljar, a delegate of the Director of Employment Standards (the "delegate"). The delegate also issued accompanying "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

2. The total amount payable under the Determination included $53,343.98 on account of unpaid wages ($39,245.87 reflecting unpaid overtime pay) and section 88 interest payable to a former Lazy F-D employee (the "complainant"), as well as $4,500.00 for nine separate $500 monetary penalties (see section 98 of the *ESA*).

3. In our view, this application passes the first stage of the two-stage *Milan Holdings* test. We are also of the view that the Appeal Decision should be confirmed, albeit for reasons that differ, in part, from those set out in the Appeal Decision.

THE MILAN HOLDINGS TEST

4. The Tribunal has a statutory discretion regarding whether it will hear and consider a section 116 application for reconsideration. In accordance with what has come to be known as the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98), the Tribunal will first consider whether the application raises an important question regarding findings of fact, matters of law, principle, or fundamental fairness. If the application does not pass this first stage, it will be summarily dismissed. If the application passes the first stage, the Tribunal will then undertake a more searching evaluation of the application.

5. In this case, Lazy F-D asserts that both the Determination and the Appeal Decision are predicated on a fundamentally incorrect interpretation and application of the "farm worker" exemption set out in the *Employment Standards Regulation* (the "*Regulation*"). A "farm worker" is comprehensively defined in section 1(1) of the *Regulation.* As noted above, the bulk of the complainant's unpaid wage award represented unpaid overtime pay. Under section 34.1 of the *Regulation*, "farm workers" are exempted from the hours of work and overtime pay provisions of Part 4 of the *ESA* (save for the section 39 "excessive hours" prohibition), as well as from Part 5 of the *ESA* (statutory holiday pay).

6. This application raises a somewhat unusual situation inasmuch as the complainant was hired under the auspices of the federal government's Temporary Foreign Worker Program ("TFWP") as an agriculture equipment technician – a position that would not ordinarily be exempt from the overtime pay and statutory holiday pay provisions of the *ESA*. However, at times (particularly in the summer and fall months), the complainant undertook work that the delegate characterized as "farm work". However, the delegate held that this latter work did not constitute the complainant's "principal employment responsibilities" and, as such, he was not disentitled to overtime pay or statutory holiday pay in relation to that work. On appeal, the Tribunal Member upheld the Determination, holding that the delegate's interpretation and application of the "farm worker" definition was essentially correct.

7. In our view, this application raises an important issue, not just for the parties to this dispute, but for all workers in agricultural workplaces in the province. This application concerns when and under what circumstances "hybrid" workers (i.e., workers hired for a particular job with specified duties and responsibilities, but who also undertake separate and substantially different duties), may be exempted from the minimum protections afforded to employees generally under the *ESA* because they could be characterized as "farm workers" within section 1(1) of the *Regulation*. More particularly, this application allows the Tribunal to further clarify the test that should be adopted when determining if an employee's "principal employment duties" are those of a "farm worker".

PRIOR PROCEEDINGS

8. Lazy F-D operates several agricultural related businesses in various locations in British Columbia. On August 30, 2018, the complainant filed an unpaid wage complaint against Lazy F-D under section 74 of the *ESA*. At this time, the complainant was still employed by Lazy F-D. On January 9, 2019, and as a result of his termination the day before (which the complainant asserted was a retaliatory discharge contrary to section 83 of the *ESA*), he expanded his complaint to include claims for compensation for length of service and vacation pay.

9. As noted above, following an investigation, the delegate awarded the complainant $53,343.98 on account of unpaid wages and interest. Lazy F-D appealed the Determination on the ground that the delegate erred in law solely in regard to her finding that the complainant was not a "farm worker" at any point during his employment. The Tribunal dismissed the appeal.

The Determination

10. The complainant worked for Lazy F-D from July 3, 2017, to January 8, 2019. His employment was arranged under the auspices of the federal government's TFWP. Although the complainant had a valid work permit when he first started working for Lazy F-D, this permit expired in October 2017, and a second work permit was not issued until February 6, 2018. Thus, although the complainant continued to work for Lazy F-D during the period from November 2017 through January 2018, he did so without a valid work permit. We should note, however, that whether or not an employee has a valid work permit is not relevant for purposes of the *ESA*. All employees, regardless of whether they hold a valid work permit, are entitled to be paid in accordance with the provisions of the *ESA* (provided, of course, that the *ESA* governs their employment).

11. Although both the complainant and Lazy F-D agreed on a number of important factual issues, there were several matters in dispute between them, including the complainant's rate of pay, whether he was entitled to overtime pay, the extent of his unpaid wage claim (Lazy F-D conceded that some wages were likely owing – see delegate's reasons, page R7), whether Lazy F-D had made unauthorized wage deductions, and whether the complainant was terminated for just cause or in retaliation for having filed an unpaid wage complaint. The delegate's findings regarding these various matters are summarized, below.

12. The delegate rejected Lazy F-D's position that in May 2018 the complainant agreed to reduce his $32 per hour wage rate (set out in a formal written agreement between the parties) to $25 per hour. It should be noted that Lazy F-D had no written evidence corroborating its assertion that the complainant agreed to reduce his hourly wage. The delegate determined that the evidence before her showed that Lazy F-D unilaterally reduced the complainant's wage rate effective June 2018 (see delegate's reasons, page R9).

13. The delegate determined that Lazy F-D unlawfully deducted $2,000 from the complainant's wages (see section 21 of the *ESA*) reflecting monies deducted for rent when, in fact, the complainant was no longer residing in employer-provided housing.

14. As for the matter of section 63 compensation for length of service, the delegate rejected Lazy F-D's "just cause" assertion (see page R16) and, accordingly, determined that the complainant was owed an additional $1,554.84 (including 4% vacation pay) under section 63 (Lazy F-D had previously paid one week's wages, but the complainant was entitled to two weeks' wages in light of his period of continuous service). The delegate rejected the complainant's position that his dismissal was a retaliatory discharge contrary to section 83 of the *ESA* (see pages R17 – R18).

15. The central issue in this application (and in the appeal) concerns whether the complainant was entitled to overtime pay and statutory holiday pay. The complainant was never paid any overtime pay or statutory holiday pay. Lazy F-D asserted that "it does not pay overtime and the Complainant was aware of this" (page R9) and, in any event, since he was a "farm worker" he was not entitled to overtime pay. It should be noted that if an employer refuses to pay overtime, and makes that practice known to its employees, that state of affairs does not relieve the employer from paying overtime to employees who otherwise are entitled to receive it (see section 4).

16. "Farm workers" are not entitled to overtime pay or statutory holiday pay under the *ESA*. A "farm worker" is defined in section 1(1) of the *Regulation* as follows:

> "farm worker" means 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) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product,

but does not include any of the following:

(e) a person employed to process the products of a farming, ranching, orchard or agricultural operation other than to do the initial washing, cleaning, sorting, grading or packing of

(i) an unprocessed product of the operation during the normal harvest cycle for that product, or

(ii) during the same harvest cycle referred to in subparagraph (i), the same or a similar unprocessed product purchased by the operation from another farming, ranching, orchard or agricultural operation;

(f) a landscape gardener or a person employed in a retail nursery;

(g) a person employed in aquaculture;

[our underlining]

17. Although the delegate accepted that Lazy F-D's business activities constituted a "farming, ranching, or agricultural operation", the delegate held that the complainant was not a "farm worker". The relevant portions of the delegate's reasons in this regard (at page R11) are as follows:

> …the Complainant was hired as an agriculture equipment technician. The work tasks listed in his employment contract do not fall under those described in section 1 of the Regulation so as to exclude him from Part 4 of the Act. His actual work duties, listed in the submitted timesheets and confirmed by the Employer, are mainly related to the maintenance and repair of farm equipment, as well as to renovations around the farm buildings. The definition of "farm worker" in section 1 of the Regulation states that the *principal* duties of a farm worker must be related to the work described in that section. Although the Complainant did complete some work tasks related to harvesting and the cultivation of land for an agricultural operation, especially during the harvesting months, when looking at his employment as a whole, I find that his principal employment responsibilities did not consist of these tasks.
>
> I find based on the evidence that the Complainant does not meet the definition of "farm worker" found in section 1 of the Regulation, and is therefore not excluded from the overtime provisions of the Act based on section 34.1 of the Regulation. I find that the Complainant is entitled to overtime to be paid at the rates stipulated in section 40 of the Act. Additionally, I find the Complainant is entitled to statutory holiday pay in accordance with Part 5 of the Act.

18. Relying on the monthly time records the complainant submitted to Lazy F-D, which the delegate held were "a full and accurate depiction of the actual hours [the complainant] worked" (page R12), the delegate determined that the complainant was owed $39,245.87 for unpaid overtime pay and $3,654.40 on account of unpaid statutory holiday pay plus 4% vacation pay ($146.18).

19. The delegate awarded the complainant a total of $53,343.98 (including section 88 interest) on account of the various unpaid wage claims.

20. Finally, the delegate levied nine separate $500 monetary penalties against Lazy F-D based on its separate contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay all earned wages within 48 hours after termination), 21 (unlawful wage deductions), 27 (failure to provide wage

statements), 42 (overtime time bank), 45 (failure to pay statutory holiday pay), 46 (premium pay for working on a statutory holiday), 58 (failure to pay vacation pay) and 63 (failure to pay compensation for length of service) of the *ESA*. Thus, the total amount payable under the Determination is $57,843.98.

Lazy F-D's Appeal

21. Lazy F-D appealed the Determination on the ground that the delegate erred in law (section 112(1)(a) of the *ESA*). In particular, Lazy F-D argued that the delegate erred in finding that the complainant was not a "farm worker" as defined in section 1(1) of the *Regulation*. Lazy F-D's appeal did not concern any other aspects of the unpaid wage award unconnected to the "farm worker" issue (for example, compensation for length of service or the unauthorized wage deductions).

22. As is clear from the delegate's reasons, the complainant had bifurcated duties with at least some of his days spent undertaking what the delegate characterized as "farm work", and other days spent attending to "maintenance and repair of large-scale agricultural equipment" (delegate's reasons, page R10). With respect to this division of labour as between "farm work" and "mechanical" duties, the delegate relied on the complainant's time records which, as noted above, she accepted as being complete and accurate. The delegate, relying on these records, observed (at page R10) "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". However, the delegate also noted that in the summer and fall months, the complainant undertook, on at least some days, work that could be fairly characterized as "farm work" (see pages R10 – R11).

23. Lazy F-D argued that the delegate was overly reliant on the parties' employment contract (as noted above, the complainant was a temporary foreign worker allowed to enter Canada to work as an agriculture equipment technician), and failed to properly account for the actual duties the complainant undertook on those days when he was not working as a technician. Lazy F-D asserted that "although hired as an equipment technician, [the complainant] spent *at least* half of his time as a farm worker working the fields, clearing lands, burning, seeding, fertilizing, cutting, bailing, storing, fencing, hauling, irrigating (pivot), repairing cattle guards, land drainage, and other tasks using or operating equipment or materials for the purposes of running an agricultural operation pursuant to the definition of 'farm worker'" (*italics* in original text). Lazy F-D maintained that: "Despite the written contract and the Labour Market Impact Assessment (LMIA), the reality and substance of the worker's history is that he was principally a "farm worker" who was also able to perform maintenance and repair work on agricultural equipment."

24. Lazy F-D referred to the complainant's own description of his work activities as set out in his complaint, filed on August 30, 2018, in which he acknowledged the bifurcated nature of his work duties: "I am doing two types of jobs: farm work and agriculture machine mechanic which is not excluded from over time. But I do not know how many hours I spent doing that." Lazy F-D's appeal submission contained a relatively granular analysis of the type of work that the complainant recorded in his daily time sheets, and then divided his work days into three categories – days spent solely undertaking equipment maintenance tasks; days spent undertaking solely "farm worker" tasks; and days spent doing both farm work and equipment maintenance (denoted as "combination days").

25. Lazy F-D maintained "that the accurate and true reflection of what occurred on Combination Days is that 80% of the work performed was farm work and 20% maintenance work". Nevertheless, for purposes of

the appeal, Lazy F-D was prepared to concede "giving the benefit to the worker, that 2/3rds of hours worked on those [combination] days was equipment maintenance work." With respect to Lazy F-D's estimate regarding the proportion of "farm" versus "mechanical" work that was undertaken on those days where the complainant undertook both kinds of work, it should be noted that the time records do not include separate hourly allocations for each individual task performed on a particular day. Rather, the time records simply record the total number of hours worked each day as well as the different tasks performed that day.

26. In summary, Lazy F-D advanced the following position:

> The Employer recognizes that exemptions under the Act are and must be interpreted narrowly to ensure minimum standards are maintained. However, only a small handful of days were spent each month where the worker worked exclusively as an Agriculture Equipment Technician. The Employer further submits that an honest appraisal of Combination Days shows that the majority of hours worked on those days were farm work within the meaning of the Act and Regulations. The worker's principal, main, or primary responsibilities were *not* that of a technician/mechanic under NOC 7312, but rather that of a "farm worker."
>
> [*emphasis* in original text]

The Appeal Decision

27. The Tribunal Member, proceeding from the well-established principle that employment standards legislation must be generously interpreted in favour of extending protections to as many employees as is reasonably possible (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986), noted that exclusions from minimum standards (such as the exemptions from overtime and statutory holiday pay for "farm workers"), should be narrowly construed. As noted above, Lazy F-D does not contest this interpretive approach.

28. The Member rejected Lazy F-D's position that in determining whether the "farm worker" exemption applied in this case, the delegate "ought to have looked at the amount of time the [complainant] spent on each task" (Appeal Decision, para. 44). Rather, as directed by the regulatory definition, the delegate was obliged to assess the complainant's "principal employment responsibilities". The Member, citing *Black's Law Dictionary* and the Miriam-Webster dictionary, observed that "principal" implies notions of primacy, importance and consequence.

29. The Member quite rightly observed that the complainant's work permit was based on Lazy F-D's application to hire the complainant for a particular position, namely, NOC code 7312 – Agriculture Equipment Technician. The LMIA made no mention of the complainant being hired to undertake the duties of a "farm worker". Further, Lazy F-D's offer of employment, dated August 30, 2017, indicated that the complainant was being offered a "full-time and permanent" position as an "Agriculture Equipment Technician". This letter set out a comprehensive list of the position's associated job duties, none of which could be reasonably characterized as falling within the section 1(1) definition of "farm worker" other than, possibly, the following: "Operate and perform routine maintenance work on agricultural equipment" and "Perform other general ranch duties as required". There is nothing in the record to indicate that Lazy F-D ever advised Service Canada, as it was obliged to do in accordance with the LMIA, that it intended to

change or modify the complainant's work duties such that he would no longer be exclusively employed as an agriculture equipment technician.

30. The Member held (at para. 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.

31. The Member, while accepting that the complainant may have undertaken some duties that could be characterized as "farm work", nonetheless held that the delegate did not err in law in finding that the complainant was not exempted from the overtime and statutory holiday pay provisions of the *ESA* on the basis that he met the regulatory definition of a "farm worker" (paras. 48 – 49):

> 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 <u>most important</u> employment responsibilities were.
>
> 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.
>
> (<u>underlining</u> in original text)

32. Lazy F-D's appeal was dismissed, and the Determination was confirmed.

Lazy F-D'S APPLICATION FOR RECONSIDERATION

33. Lazy F-D's application for reconsideration largely reiterates the arguments it advanced on appeal. Lazy F-D says that the total amount of time a worker spends undertaking particular duties must be taken into account when determining if that worker is a "farm worker". Lazy F-D says that the phrase "principal employment responsibilities" cannot be interpreted as meaning the "most important" duties without considering the actual amount of time a worker spends performing individual tasks. Finally, Lazy F-D says that the Member erred "in holding that third parties, such as Citizenship & Immigration Canada, a LMIA, and Work Permit are determinative of an employee's status independent of the work performed."

34. A "farm worker" is defined in section 1(1) of the *Regulation* in terms of the worker's "principal employment responsibilities". Similarly, a "manager" is defined in the same subsection in terms of the individual's "principal employment responsibilities" consisting of certain duties (a "manager" is also defined as a person who serves as an "executive"). Lazy F-D submits, as a matter of statutory

interpretation, that the two identical phrases should be interpreted and applied in the same manner. And in that regard, Lazy F-D says since the Tribunal's jurisprudence clearly establishes that in determining whether an individual is a "manager", that individual's actual day-to-day job duties must be taken into account, a similar analysis must be undertaken when determining if an individual is a "farm worker". Lazy F-D maintains that a determination regarding "farm worker" status "must include an analysis of the work performed, the amount of time spent doing the statutorily enumerated duties, the nature of other job functions, and a total characterization of the person's work."

35. By way of remedy, Lazy F-D asks that all wages awarded to the complainant under Part 4 (overtime pay) or Part 5 (statutory holiday pay), and the associated monetary penalties, "be removed and deducted from the Determination". Alternatively, Lazy F-D says the matter of the complainant's unpaid wage entitlement should be referred back to another delegate "for the purposes of conducting an analysis of the [complainant's] *'principal employment responsibilities'* consistent with the Tribunal's jurisprudence and any other directions issued by the Reconsideration panel" (*'emphasis'* in original text).

36. The complainant, although invited to file a submission in reply to Lazy F-D's reconsideration application, declined to do so. The delegate filed a brief submission (essentially, one paragraph) in which she maintained that she *did* undertake the very sort of analysis suggested by Lazy F-D, and that, having done so, concluded that the complainant's "principal employment responsibilities did not consist of the tasks listed in the definition of 'farm worker' found in section 1 of the Regulation."

37. In its final reply submission, Lazy F-D takes issue with the delegate's position on reconsideration, asserting that the delegate has seemingly changed the fundamental basis underlying her original Determination. In particular, Lazy F-D notes that in the delegate's submission in the appeal, she stated: "**Even though a large portion of the Complainant's work duties did consist of farm work**, this would still not equate to his principal work responsibilities, **especially taking into consideration that he was not employed for the purposes of doing farm work**." (**boldface** in Lazy F-D's submission). Further, Lazy F-D says that the Tribunal Member accepted this analysis and notes that at para. 49 of the Appeal Decision, the Member stated:

> **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 <u>most important</u> employment responsibilities were.
>
> 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, <u>irrespective of the time he spent performing them</u>.**
>
> (**boldface** and **<u>underlining</u>** in Lazy F-D's submission)

FINDINGS AND ANALYSIS

38. The phrase "principal employment responsibilities" appears in the definitions of both "farm worker" and "manager" set out in section 1(1) of the *Regulation*. In addition, section 65(1)(e) of the *ESA* refers to "an employer whose *principal* business is construction".

39. In the leading treatise, *Sullivan on the Construction of Statutes* (6th edition, 2014), the author states that "within a statute or other legislative instrument the same words have the same meaning". This principle has been repeatedly endorsed by Canadian courts, including recently by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, where the court observed (at para. 44): "Accepting that the word 'appeal' refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes" [citing *Sullivan*, *supra*].

40. In our view, the Tribunal's interpretive approach to the word "principal" in these various provisions of the *ESA* and the *Regulation* should be consistent and, most particularly, when the word "principal" tempers the phrase "employment responsibilities". "Principal employment responsibilities" must be consistently construed and applied, irrespective of whether one is referring to a "manager" or to a "farm worker".

41. With respect to the section 65(1)(e) exclusion regarding compensation for length of service and group termination pay, the Tribunal has held that whether a firm's "principal" business is construction must be determined using a "functional analysis" (see *Northland Excavating Ltd.*, BC EST # D035/17 at para. 40, and *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05 at pages 5 – 6). In *Lockerbie*, the Tribunal quoted with approval, the following statement from an earlier B.C. Supreme Court decision, *Honeywell Ltd. v. The Director of Employment Standards*, 1997 CanLII 4191: "An employee's predominant kind of work at any site should be determined by reference to time consumed in repair or alteration functions relative to total effort at the site. Time is the most objective measure in the context of employment."

42. As is discussed, below, the Tribunal has also taken a comprehensive "functional approach" when determining if an employee is a "manager" or a "farm worker".

"Manager" – "principal employment responsibilities"

43. The phrase "principal employment responsibilities" in relation to a "manager" was formerly worded as "primary employment duties". In *Director of Employment Standards (Amelia Street Bistro)*, BC EST # D479/97, a three-person reconsideration panel held (at page 6):

> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager".

44. The *Amelia Street* decision, which has frequently been cited with approval in later Tribunal decisions, supports the notion that an analysis of the individual's actual duties should be undertaken, with a view to determining the employee's predominant duties among all of the duties that the employee actually performed (see *Lockerbie*, *supra*). While the weight to be attributed to the individual factors identified in *Amelia Street* will depend on the circumstances of the particular case, the person's actual job title will invariably be of little or no assistance. Further, provisions exempting employees from minimum statutory protections should be strictly construed, consistent with the well-established notion that *ESA* provisions that limit or restrict statutory entitlements should be interpreted narrowly.

45. In a recent decision, based on the language of the current managerial exemption, the Tribunal upheld a determination that an individual was not a manager, even though he had some supervisory duties, because the bulk of his duties were occupied with non-managerial tasks (see *LMSCL Lower Mainland Society for Community Living*, 2020 BCEST 42, reconsideration refused: 2020 BCEST 118). In *Parsons*, 2019 BCEST 85, the Tribunal stated (at para 83): "A question about whether an employee is a manager under the *ESA* is one of mixed fact and law, requiring an application of findings of facts about what the employee actually does to the definition of manager in the *Regulation*" (our underlining). Other decisions where the Tribunal has considered the totality of the employee's duties and responsibilities in determining if the individual was a "manager" include *Mega III Pizzaria and Cafe Ltd.*, BC EST # D090/17, *Frontier-Kemper Constructors ULC*, BC EST # D078/12, and *Whitehall Bureau of Canada Limite*d, BC EST # D026/10

"Farm Worker" – principal employment responsibilities

46. The "farm worker" definition is somewhat complex, including four separate categories of work, while excluding three other categories. Broadly speaking, the definition encompasses work undertaken on a farm in relation to that farm's agricultural products, but it excludes employees working in food processing and retail operations, or as landscapers/gardeners, as well any person employed in the aquaculture industry.

47. In *Anthony*, BC EST # RD123/17, a three-person reconsideration panel stated, in relation to the "farm worker" definition (at para. 41): "…any conclusion about whether an employee meets the definition in a regulatory exclusion depends upon a total characterization of that person's duties" (our underlining). The determination of whether an employee is a "farm worker" is largely a factual matter, requiring "evidence to show a person's principal employment responsibilities consist of those matters listed in paragraphs (a) to (d) [of the regulatory definition]" (*Anthony*, para. 41).

48. In our view, the fundamental interpretive principles applicable to the definition of "manager" apply with equal force to the definition of "farm worker", namely, job titles are, in the vast majority of cases, largely irrelevant, and exempting provisions should be narrowly construed. Most importantly for present purposes, an employee should not be characterized as a "farm worker" without a judicious assessment of the totality of the employee's actual job duties and responsibilities.

Application to this case

49. We endorse the findings in the Appeal Decision that the complainant was hired under the auspices of the TFWP as an agriculture equipment technician presumably because he had skills that no Canadian was available to perform. That being the case, the LMIA, and the concomitant work permit that was issued

allowing Lazy F-D to hire the complainant, must be taken into account when determining whether the complainant was, in fact and in law, a "farm worker". It should be noted that the LMIA made no mention of the complainant being hired to undertake the duties of a "farm worker". Lazy F-D's offer of employment, dated August 30, 2017, indicated that the complainant was being offered a "full-time and permanent" position as an "Agriculture Equipment Technician". This letter set out a comprehensive list of the position's associated job duties, none of which could be reasonably characterized as falling within the section 1(1) definition of "farm worker" other than, possibly, the following: "Operate and perform routine maintenance work on agricultural equipment" and "Perform other general ranch duties as required".

50. There is nothing in the record to indicate that Lazy F-D ever advised Service Canada, as it was obliged to do in accordance with LMIA, that it intended to change or modify the complainant's work duties such that he would no longer be exclusively employed as an agriculture equipment technician. Nevertheless, we are unable to conclude that the terms of the complainant's original hiring somehow rendered moot any assessment of the actual work he undertook, considered in its entirety, during his employment with Lazy F-D. To the extent that the Appeal Decision suggests otherwise (for example, in paras. 44 and 46), we consider that approach to be inconsistent with the Tribunal's jurisprudence regarding the interpretation and application of the phrase "principal employment responsibilities".

51. The complainant candidly acknowledged that, at times, he undertook tasks other than those contained in the job description for the position of agriculture equipment technician (the position he was offered and accepted). The complainant also conceded that his work, at times, consisted of duties similar to those that are performed by farm workers, although he was unable to say how many hours, he spent doing what could be characterized as "farm work". However, it does not follow that merely because the complainant undertook some "farm work" during his tenure, he was, by that fact alone, a "farm worker".

52. We think it important to stress that the *only* time records available to the delegate were those compiled by the complainant and submitted to Lazy F-D on a monthly basis. These records generally describe the tasks undertaken each day, as well as the total number of hours worked each day, but do not separately record the time spent on each of the individual tasks identified (and, on most days, the time sheets show that multiple tasks were undertaken). A comprehensive examination of the complainant's timesheets convinced the delegate (at page R10) that "<u>except for the summer months</u>, the vast majority of the tasks the Complainant completed are related to the maintenance and repair of large-scale agricultural equipment" (our <u>underlining</u>). Even during the summer months when the complainant performed some tasks more characteristic of a "farm worker", the nature of his duties remained decidedly mixed. During the summer months, the complainant's work included elements of both mechanical repair and farm work, depending on the day, and the type of work perceived to be the most pressing at the time. The following passage from the delegate's reasons makes this clear (at pages R10 – R11):

> <u>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</u> (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, <u>12 days doing work mostly related to harvesting activities, such as baling hay, and 6 days doing both of these things</u>. 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 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 on 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 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 roughly to the same pattern as the previous year, up until the Complainant's termination in January of 2019.
>
> [our underlining]

53. The analytical problem posed in this case is that during his tenure, the complainant, at different times of the year (especially in the summer months), spent many hours undertaking what could be reasonably characterized as "farm work", although given the limitations of the time records, one cannot say whether this work constituted the majority of his total working hours during the summer months. Despite this, the substance of the delegate's findings concerning the time spent by the complainant performing farm work, and its overall import relative to the agriculture equipment technician role for which he was hired, leads us to conclude that the delegate correctly determined that the complainant was not a "farm worker". While the complainant's farm work might not have been purely incidental to his work as an agriculture equipment technician, the farm work must nevertheless be characterized as ancillary to the complainant's primary role as a mechanic.

54. Since the definition of "farm worker" focuses on the employee's "principal" employment responsibilities, it is axiomatic that there may be individuals who undertake something more than an incidental amount of farming-related tasks, but yet cannot be fairly characterized as "farm workers" as defined in section 1(1) of the *Regulation*. We are of the view that this case is one such instance. This is not a situation where the complainant was expressly hired to perform two separate and distinct jobs, namely "agriculture equipment technician" and "farm worker", each with separate duties and responsibilities. Section 2(b) of the *ESA* states that one of the purposes of the statute is to promote fair treatment of employees and employers; section 2(c) refers to the encouragement of open communication between employees and employers. We note that the complainant was supposedly hired – according to the parties' written employment contract dated August 30, 2017 – into a "full-time and permanent" position ("40 hours a week") *as an agriculture equipment technician*. The contract does not specifically list "farm work" (other than perhaps the reference to "general ranch duties") and does not state that overtime will not be paid in relation to any farm work that might be undertaken. In light of the Tribunal's decision in *Aquilini et al.*, 2020 BCEST 90, this contract could be taken as a representation regarding the position for which the complainant was hired, and the amount of work that was being offered to him. To the extent that there was a misrepresentation regarding the terms of his engagement (a matter about which we express no opinion), the complainant might have had other remedies under sections 8 and 79(2) of the *ESA*.

55. While it may be possible to envision a scenario where there are, in essence, two separate employment contracts with separate terms and conditions and statutory entitlements, this is not such a case. The *only* position for which the complainant was hired was that of an agriculture equipment technician. Indeed, the centrality of the complainant's role as an agriculture equipment technician is underscored by Lazy F-D's position before the delegate regarding his dismissal, namely, that it dismissed the complainant solely because he was not a "qualified", or was otherwise an "unsatisfactory", *mechanic*. This position was also set out in Lazy F-D's termination letter dated January 8, 2019: "This termination is based on your unsatisfactory performance as an Ag Mechanic, your unwillingness to obtain your Class 1 Drivers License as required, as well as your negligence to provide a copy of your Ag Mechanics Certification" [*sic*].

56. Our analysis is also informed by the Supreme Court of Canada's admonition in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, that employment standards legislation provides minimum benefits and standards in order to protect the interests of potentially vulnerable employees. These statutes must, therefore, be characterized as benefits-conferring legislation and, accordingly, be interpreted in a broad and generous manner. It follows that any doubt arising from the interpretation or application of a provision in the *ESA*, or in an accompanying regulation, should be resolved in favour of the employee. Where there is a legitimate question regarding whether an employee is not entitled to a statutory benefit by reason of a regulatory exemption, the burden lies on the employer to demonstrate, in accordance with the usual civil standard of proof, that the employee is not so entitled.

57. If the complainant were a "farm worker" as defined in section 1(1) of the *Regulation*, he would be precluded from receiving basic statutory entitlements that most other employees enjoy, such as overtime pay and statutory holiday pay. If an employee is to be denied basic statutory entitlements by reason of a regulatory exclusion, it should be clear and obvious that the individual meets the requisite regulatory definition (see *JP Metal Masters 2000 Inc.* BC EST # RD137/05; *Northland Properties Limited operating as Sandman Hotels and Inns Vernon and Sandman Inn (Blue River)* BC EST # D004/98, affirmed on reconsideration BC EST # D423/98). As we have said, the scope of an exclusion from the *ESA* is presumed to be limited, and so there must be clear evidence justifying the application of the exclusion. Moreover, the burden of establishing the factual and legal basis for the exclusion lies with the person asserting it (see *Northland Properties Limited* BC EST # D004/98). The employee's entitlement, or exemption, as the case may be, should be reflected in the payroll records that employers are required to maintain under section 28 of the *ESA*, and in the section 27 wage statements that employers are required to provide to employees "on every payday". In our view, Lazy F-D's records (essentially, the complainant's own time records) fall well short of establishing that the complainant devoted the majority of his working hours to "farm work" and was, in fact, a "farm worker".

58. The question regarding whether the complainant was a "farm worker" must be answered based on a total characterization of the duties he performed, and the degree to which the various components of those duties clearly establish that he fell within the exemption. The delegate's conclusions regarding the complainant's principal employment responsibilities must, for the most part, be deemed to constitute findings of fact.

59. As the Tribunal stated in *Anthony*, *supra*:

> Questions of fact determined by the Director are not reviewable by the Tribunal on appeal, absent evidence of palpable and overriding error resulting in findings that are irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned findings of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This is so even in circumstances where the evidence before the Director might have led the Tribunal to make different findings of fact than those appearing in a determination (see *Britco Structures Ltd.* BC EST # D260/03; *Carestation Health Centres (Seymour) Ltd.* BC EST # RD106/10).

60. In our view, the delegate's conclusions regarding the complainant's principal employment responsibilities were based on findings of fact that should not be disturbed, because they are not perverse or inexplicable. The delegate conducted a detailed review of the complainant's activities based on the timesheets that both parties accepted as accurate. The delegate determined that while the complainant "did complete some work tasks related to harvesting and the cultivation of land for an agricultural operation, especially during the harvesting months", a consideration of the various aspects of the complainant's employment duties and responsibilities, examined as a whole, led to the conclusion that "his principal employment responsibilities did not consist of these tasks" (page R11). That finding, in light of the fact that a very substantial portion of the complainant's time was devoted to undertaking mechanical repair work as an agriculture equipment technician – the only work the complainant was lawfully entitled to perform in Canada – leads us to conclude that there was sufficient evidence before the delegate allowing her to reasonably conclude that the complainant's "principal employment responsibilities" were not those of a "farm worker".

61. Even if we disagreed with the delegate's findings of fact on this latter point, it is not open to us, and it was not open to the Tribunal in the original appeal, to render a decision that is inconsistent with, and in fact wholly undermines, the delegate's factual findings. Put differently, it is not open to the Tribunal to re-weigh the evidence before the delegate, and to come to a different conclusion regarding the inferences to be drawn from it, as Lazy F-D has asked the Tribunal to do, without it being first established that the delegate's factual findings were perverse or inexplicable.

62. Since we are of the opinion Lazy F-D has not established that the delegate's findings of fact are perverse or inexplicable, or that the Appeal Decision reveals that the Member committed any reviewable error justifying a different result, we have decided that Lazy F-D's application for reconsideration must be dismissed.

ORDER

63. Lazy F-D's application for reconsideration is dismissed. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision, 2020 BCEST 110, is confirmed.

Kenneth Wm. Thornicroft **Panel Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**	**Shafik Bhalloo** **Member** **Employment Standards Tribunal**