

An appeal

- by -

RB Farm Contracting Ltd.
("RB Farm")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/125

DATE OF DECISION: January 15, 2008

DECISION

SUBMISSIONS

Tony Bhullar, Esq. on behalf of RB Farm Contracting Ltd.
Ravi Sandhu on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by RB Farm Contracting Ltd. (“RB Farm”) of a Determination that was issued on August 30, 2007 by a delegate of the Director of Employment Standards (the “Director”).
2. The Determination found that RB Farm had contravened Section 6 of the *Employment Standards Regulation* (the “Regulation”) for the second time in the last three years, by failing to make a daily log available for inspection, and ordered RB Farm to cease contravening the *Regulation*, to comply with all requirements of the *Act* and *Regulation* and imposed an administrative penalty on RB Farm under Section 29 of the *Employment Standards Regulation* in the amount of \$2500.00.
3. RB Farm has appealed the Determination on the ground that the Director erred in law. The appeal raises questions relating to the authority of the persons visiting the work site to demand inspection of the daily log that is required to be kept under Section 6(4) of the *Regulation*, whether RB Farm is a “farm labour contractor” under the *Act* and *Regulation* and whether the Determination is factually correct I finding the daily log was not on the work site.
4. RB Farm also says it was denied full disclosure and given no opportunity to make “full answer and defence”.
5. RB Farm has asked the Tribunal for an oral hearing on the appeal. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue in this case is whether RB Farm has shown the Director erred in law in the Determination.

THE FACTS

7. The facts are set out in the Determination. As it relates to the arguments raised in the appeal, the relevant findings of fact are found in the following excerpts from the Determination:

On August 2, 2007, the Employment Standards Branch Agricultural Compliance Team (the “Team”) conducted a site visit at NRK Sahota Farm

. . . workers were harvesting blueberries . . .

. . . Ravi Sandhu (“Sandhu”), Employment Standards Officer, proceeded to question Sahota about the farm van that had just left the worksite. Sandhu was informed by Sahota that that particular farm van belonged to [RB Farm] and that [RB Farm] was the only [Farm Labour Contractor] on site that day. Sandhu also learned that Ranjit Bal (“Bal”), the Director of [RB Farm], was not present at the worksite himself. When Sandhu asked Sahota about [RB Farm’s] daily log, Sahota said that [RB Farm’s] driver had taken it with him in the farm van that just left the worksite.

The Team proceeded to interview [RB Farm’s] employees and ask them if the daily log had been left with them. None of [RB Farm’s] employees produced a daily log for inspection by the Delegate.

[RB Farm] was aware of the requirements of the *Act* and the *Regulation* as it had been through the licensing process in prior years.

ARGUMENT AND ANALYSIS

8. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those 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.*

9. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. Accordingly, the burden is on RB Farm is to show the Director erred in law. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).

10. The Tribunal has adopted the 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.
11. RB Farm says the authority of the persons attending the site to require the production of the daily log has not been established. They say that authority must be established through an evidentiary hearing.
12. The burden of showing, as a matter of law, that the persons who attended the work site lacked the authority to conduct an investigation, including requiring production of the daily log, is on RB Farm. While RB Farm has raised the question, there is nothing in the appeal that would persuade me that the persons who attended were not the Employment Standards Branch Agricultural Compliance Team or that they did not have the authority to enter the worksite and conduct an investigation (see *Townline Growers (1994) Ltd.*, BC EST #D017/03 for a discussion of the statutory authority of delegates of the Director under Section 85). The Determination identifies Mr. Sandhu as an Employment Standards Officer. There is no other person identified in the Determination. That omission has been corrected in a letter from the Director dated December 19, 2007 in which four persons, including Mr. Sandhu, are identified as members of the Agricultural Compliance Team that conducted a site visit at NRK Sahota Farm on August 2, 2007. All of the persons identified are industrial relations or employment standards officers with authority under Section 117 of the *Act* to enter the worksite, NRK Sahota Farm, and conduct an investigation.
13. RB Farm challenges the assertion any of the individuals were delegated by the Director to enter the worksite and conduct an investigation. They say such delegation must be by way of an Order in Council, or some other legally binding instrument. That suggestion has been rejected by the Tribunal. In *Junior Contracting Ltd.*, BC EST #D358/98, the Tribunal stated:
- I agree with the Director that there is no requirement in the *Act* that delegation is in writing. The only requirement in the *Act* is in Section 117(4) [now subsection 117(6)] which provides that a “person who claims to be carrying out a function, duty or power delegated ... must, on request, produce evidence of the delegation”.
14. There is no indication that the persons who attended the worksite were asked to produce evidence of delegation and failed to do so. The fact that all of the persons were employment standards or industrial relations officers, there is a high degree of probability they were delegated authority to enter the worksite and conduct an investigation. In light of that evidence and the assertion from Mr. Sandhu that all of the persons possessed the requisite authority, the burden falls on RB Farm to provide *some* information to rebut the logical inference of that evidence and assertion. As they have not done so, this argument is rejected.

15. There is no dispute that the workers on site were harvesting blueberries. There is also no doubt that RB Farm is a licensed farm labour contractor under the *Act*. Section 1 of the *Act* defines a farm labour contractor to mean:

... an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product.

16. RB Farm says, however, that the Director has not established the persons working at the site were employed and were being supplied at that particular time by a “farm labour contractor” as that term is defined. RB Farm says there is no evidence that they were simply supplying labour to NRK Sahota Farm. RB Farm says that the persons at the site were employees of RB Farm but in fact, were, at all times, under its control and direction. A similar argument was raised and addressed by the Tribunal in *Mainland Farm Labour Supply Ltd.*, BC EST #D058/06. In that case, Mainland argued it fell outside the definition of “farm labour contractor” because it alone had control and supervision of its employees at all material times. Mainland contended that the definition applies only to a contractor who simply supplies labour, but is not involved in the direction or control of that labour. In rejecting that argument, the Tribunal said:

The issue, as it is raised in this appeal, has focused on whether the employees of Mainland were under the control or direction of Mainland or of Harry Bros. Farms. That is a factual question which, if it were necessary to resolve in order to decide this part of the appeal, would need to be returned to the Director for further investigation and consideration. The argument by Mainland, however, ignores one element of the definition about which there is no dispute. The definition of “farm labour contractor” includes an employer whose employees work *for . . . another person, in connection with . . .*. In my view, the word “*for*” should be given an expansive meaning consistent with the nature of the relationship that is being described. An employee of a farm labour contractor is, at least, working “*for*” another person where the work that is being done by that employee benefits that other person in a material way. The Determination and material indicate the employees of Mainland were working on Harry Bros. Farms land, harvesting blueberries on that farm for Harry Bros. Farms. There is no doubt on those facts that Mainland’s employees were working for Harry Bros. Farms at the relevant time. Those facts are sufficient to bring Mainland within the definition of “farm labour contractor” in the *Act*.

17. Like the argument made in the *Mainland* case, the argument made by RB Farm here ignores the clear inference from the facts: that the employees of RB Farm were working *for* NRK Sahota Farms, harvesting RK Sahota Farms’ blueberries for the benefit of NRK Sahota Farms. That circumstance brings RB Farm within the definition of farm labour contractor in the *Act*.

18. RB Farm argues the Director erred in finding the daily log was not on the site. RB Farm says the transport vehicle is part of the “worksites”. I do not accept this argument. It suggests a view of the “worksites” that is absurd, unworkable and inconsistent with the obligations found in Section 6(4).

19. I accept the comments found in the excerpt from *Dhillon Labour Contractors Ltd.*, where the Tribunal noted that part of the responsibility of a farm labour contractor under Section 6(4) of the *Regulation* is to have the daily log “available for inspection” and that it is “not the Team’s responsibility to seek it out”. To suggest the transport vehicle is part of the “worksites”, wherever it is and whether or not the Agricultural Compliance Team can find it, would offend both of those elements of the obligation in Section 6(4) and make that statutory obligation illusory and virtually unenforceable. As a matter of statutory interpretation, the Tribunal should interpret the rights and duties set out in the *Act* in a way that makes sense and accords with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

20. RB Farm infers that in any event, the transport vehicle was on the farm. This suggestion does not accord with either the information provided to a delegate on the Agricultural Compliance Team or with the findings of fact made in the Determination. As I have already stated, the grounds of appeal under Section 112 of the *Act* do not allow the Tribunal to consider appeals based on findings of fact unless such findings are shown to be errors of law. The burden is on RB Farm to show a reviewable error and they have not done that in respect of this point.
21. I do not accept that RB Farm was denied any of the procedural protections provided in the *Act* or by operation of principles of natural justice. It is clear from the Determination that RB Farm was aware of the concern that the work site visit gave rise to and was provided with two opportunities to respond to that concern. A letter was provided to RB Farm by the Director, dated August 3, 2007 which sets out the essential elements of the case and offers RB Farm an opportunity to respond. RB Farm says that “no notes, memoranda or other information regarding RB has been supplied”. The foregoing assertion, however, is unaccompanied by any analysis relating the alleged failure to provide such information to a denial of fair hearing. I repeat once again that the burden of showing an error is on RB Farm. That burden is not met simply by raising the argument; it requires RB Farm to objectively demonstrate how its statutory and procedural rights have been denied. The argument in this case is entirely speculative. There is no objective basis that would justify any further consideration of the argument, and accordingly it is dismissed.
22. For the above reasons, the appeal is dismissed.

ORDER

23. Pursuant to Section 115 of the Act, I order the Determination dated August 30, 2007 be confirmed in the amount of \$2500.00

David B. Stevenson
Member
Employment Standards Tribunal