

An appeal

- by -

Samra Bros. Blueberry Farms Ltd.
(“Samra”)

- 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: Robert E. Groves

FILE No.: 2009A/141

DATE OF DECISION: January 12, 2010

DECISION

SUBMISSIONS

Napinder Pandher on behalf of Samra Bros. Blueberry Farms Ltd.
Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. Samra Bros. Blueberry Farms Ltd. ("Samra") appeals a determination of a delegate of the Director of Employment Standards (the "Delegate") dated September 17, 2009 (the "Determination").
2. Having conducted an investigation of Samra's farm labour practices, the Delegate determined that Samra had contravened section 13 of the *Employment Standards Act* (the "*Act*"), and sections 6 and 6.1 of the *Employment Standards Regulation* (the "*Regulation*"). The Delegate ordered Samra to cease the contraventions, and imposed three administrative penalties of \$500.00, for a total of \$1,500.00.
3. I have before me Samra's Appeal Form, a submission from Samra's agent, Napinder Pandher ("Pandher"), and supporting documents. I also have the Determination, the Reasons for the Determination, and a submission delivered on behalf of the Director together with the record that was before the Delegate at the time the Determination was made.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. On July 24, 2009, an Agricultural Compliance Team from the Employment Standards Branch (the "Team") conducted a work site visit at the farm premises of Pashaura Enterprises Ltd., which carries on business in Cloverdale under the name Surjit Gill Farm ("Surjit").
6. The Team interviewed several of the persons who were present at the site and who were harvesting blueberries that day. They informed the Team that they were employees of Samra.
7. Samra operates a blueberry farm of its own. However, on July 24, 2009, Samra was not licensed to conduct business as a farm labour contractor.
8. In section 1 of the *Act*, a "farm labour contractor" is defined 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.
9. Section 13(1) of the *Act* provides that a person must not act as a farm labour contractor unless the person is licensed.

10. The Team also observed that there was a vehicle located at the site. A Surjit employee informed the Team that the vehicle belonged to Samra. This was confirmed by another person at the site, a Hardev Ughra ("Ughra"). Mr. Ughra also advised the Team that he had transported the Samra employees to the Surjit site to pick blueberries, as Samra's own blueberries were not yet ready for harvest.
11. Upon checking the licence plate number of the Samra vehicle, the Team learned that the vehicle was not registered with the Branch as required by section 6(1)(f) of the *Regulation*, which reads:

- 6.(1) A farm labour contractor must do all of the following:...
- (f) file with the director
- (i) an up-to-date list of the registration numbers and licence numbers of each vehicle used by the farm labour contractor for transporting employees...

12. The Team also inspected the vehicle, and saw that there was no safety notice posted in it, as was required by section 6.1 of the *Regulation*. That section says this:

- 6.1(1) A farm labour contractor must, in every vehicle used by the farm labour contractor to transport employees, post a notice provided by the director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers Compensation Act*, including driver, seating and seat belt requirements.
- (2) A notice required to be posted under subsection (1) must be displayed in one or more positions in the vehicle that are clearly visible to the driver or operator of the vehicle and employees riding in the vehicle.

13. Following the site visit, a delegate of the Director, Amandeep Jassal ("Jassal"), sent a letter to Samra dated July 28, 2009 (the "July 28 letter"), outlining the observations of the Team, and suggesting to Samra that they appeared to indicate contraventions of section 13 of the *Act*, and sections 6(1)(f) and 6.1 of the *Regulation*. The July 28 letter invited Samra to respond by August 10, 2009, and stated that a failure to do so would mean that a determination would be issued.

14. It appears that Samra did not respond to the July 28 letter as requested. The Reasons for the Determination say that on September 4, 2009, the Delegate spoke to a Lakhwinder Samra "of Samra" to find out if Samra intended to submit a response. The Reasons state that Lakhwinder Samra advised the Delegate that a response had previously been mailed. The Delegate asked that a copy of that response also be faxed to the Branch by September 8, 2009. However, no response from Samra was received by the Branch prior to the issuance of the Determination on September 17, 2009.

15. The record indicates that sometime after September 17, 2009 the Branch received a letter from a Sam Samra dated August 25, 2009 (the "August 25 letter"). That letter identified Mr. Samra as a "Director" and indicated on its face that it was being sent on behalf of Samra regarding the same file number which had appeared on the July 28 letter. The typed body of the August 25 letter said this, in part:

Dear Amandeep Jassal,

As per our conversation over the phone, I am responding to your letter dated July 28, 2009.

On July 24, 2009 we had workers available for a day but no work, so we sent them to Surjit Gill Farm. On this same day you conducted a site visit. In your letter, you show concern that our company might be a Farm Labour Contractor. I assure you that we are not contractors. We have our own labour that we use solely for our own purposes.

16. The August 25 letter also included what appears to be a handwritten note dated September 22, 2009 (the "September 22 note"), which reads as follows:
- Amandeep, please accept our apologies, we had sent this letter to you on Aug 25 but it was returned to us. I am re-sending it to you. If you have any questions please contact us Also please find attached a copy of the returned mail.
17. In his submission delivered on behalf of Samra on this appeal, Mr. Pandher says that the correspondence forwarded by the Branch to Samra was sent to the wrong address. He says further that Samra only became aware of this correspondence when Mr. Jassal "called about it." Samra then responded by mail, but it neglected to include the city and province of destination on the address appearing on the envelope, and so its response was returned to it by Canada Post. Mr. Pandher states that Samra also faxed its letter to Mr. Jassal "within the time frame."
18. Mr. Pandher asserts that the Determination should be cancelled because it was the product of a "misunderstanding," in that Samra never intended to withhold information from the Branch.
19. The submission of the Director delivered to the Tribunal for the purposes of this appeal says that Samra has not disputed, in substance, any of the information gleaned by the Team during its investigation conducted at the Surjit site on July 24, 2009, and so the appeal should be denied.

ISSUE

20. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

21. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 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 being made.
22. Section 115(1) of the *Act* should also be noted. It says this:
- 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
23. Samra's appeal invokes section 112(1)(c) of the *Act*. It submits that evidence has become available that was not available at the time the Determination was being made.

24. I infer from Samra's submission that the evidence to which it is referring is the August 25 letter, the September 22 note subsequently enclosed with it, and Mr. Pandher's explanation of the reasons why the August 25 letter did not come to the attention of the Delegate prior to the issuance of the Determination.
25. The Tribunal takes a strict view of its jurisdiction under section 112(1)(c). If the "new" evidence an appellant seeks to present was available in the sense that it could, with reasonable diligence, have been provided to a delegate during the course of an investigation and prior to the issuance of a determination, the Tribunal will usually decline to consider the evidence for the purpose of deciding the appeal (see *MSI Delivery Services Ltd.*, BC EST # D051/06). Having said that, the Tribunal must also be mindful of its obligation to ensure a fair hearing. It therefore retains a discretion to admit new evidence where circumstances warrant.
26. In order to determine whether the proper circumstances exist for the admission of new evidence, the Tribunal will consider, *inter alia*, the reasons why the evidence was not presented earlier, the importance of the evidence, and the potential prejudice to a party if it were to be admitted (see *Specialty Motor Cars (1970) Ltd.*, BC EST # D570/98; *TSI Telequip Services Inc.*, BC EST # D221/99).
27. In this case, it is clear that Samra was aware of the allegations being made against it in the July 28 letter, and that it sought to respond to them in writing by means of the August 25 letter before the Determination was issued. The evidence contained in the August 25 letter did not come to the attention of the Delegate before he issued the Determination because Samra addressed its August 25 letter incorrectly, and the correspondence was returned.
28. Samra further submits that it faxed a copy of its August 25 letter to the Branch, but it has included no documentary evidence such as a facsimile transmission report to corroborate this statement. The Delegate's Reasons for the Determination state that no response to the matters raised in the investigation was received by the Branch.
29. While I believe that Samra's response contained in its August 25 letter could have been delivered to the Branch in a timely way had Samra exercised greater care, the fact remains that Samra does appear to have taken steps to make the Delegate aware of its position prior to the issuance of the Determination. In the result, those efforts failed, and so the evidence in the August 25 letter, while available to Samra, was not available to the Delegate at the time the Determination was made. In the peculiar circumstances of this case, I am prepared to conclude that this failure was the result of error, or mishap, and not an intention on the part of Samra to ignore requests for a response.
30. I do not discern that my considering the August 25 letter on the merits will prejudice the position of the Director in this matter. The question at issue on the appeal is whether Samra should pay administrative penalties. The Director has referred to no facts that would support a finding of prejudice should I consider the substantive elements of the letter in order to decide the appeal.
31. The evidence is important, in my view, because it purports to set out Samra's position regarding the allegations made against it arising from the visit of the Team to the Surjit property on July 24, 2009.
32. I have decided, therefore, to admit the evidence of the August 25 letter in order to resolve the issues raised in this appeal.
33. The August 25 letter denies that Samra is a farm labour contractor. It admits, however, that it sent its workers to Surjit on July 24, 2009 because it had no work for them to do on its own farm. It does not contradict the statement contained in the Reasons for Determination to the effect that the Team observed

Samra workers harvesting blueberries for Surjit on that day. The inference to be drawn from these facts is that Samra employees were working for Surjit in connection with the harvesting of blueberries, and for its benefit. That being so, Samra fell within the definition of "farm labour contractor" that is contained in section 1 of the *Act* (see *RB Farm Contracting Ltd.*, BC EST # D003/08).

34. Samra nowhere alleges that it was the holder of a licence to carry on business as a farm labour contractor on July 24, 2009, that it had filed with the Director the registration particulars required by section 6(1)(f) of the *Regulation*, or that it had posted the notice mandated by *Regulation* section 6.1.
35. It follows, in my opinion, that Samra has demonstrated no grounds for my interfering with the conclusions drawn by the Delegate in the Determination.

ORDER

36. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated September 17, 2009, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal