

An appeal

- by -

Townline Growers (1994) Ltd.
("Townline" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2002/536

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Townline Growers (1994) Ltd. (“Townline”, “farmer” or “Employer”), from a Determination dated October 18, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Agricultural Compliance Team (“*Team*”) of the Director attempted to inspect a work site owned by Townline Growers (1994) Ltd., and was denied entry to the site by Jerry Alamwala of Townline. Townline argued that *Team* had no power to enter the site, did not disclose the reasons for entry to the site to the farmer, and was restricted from exercising its power to enter by statements made by a representative of the Employment Standards Branch (“*Branch*”) at a policy meeting with the farmers. The farmer also argued that the Determination should be set aside because it did not contain a Determination number.

It was apparent that the *Team* was investigating a complaint regarding rate payments and minimum wages in the broccoli industry, and was acting upon information of a violation. The *Team* also determined that there were workers present on Townline’s site or premises at the time they attended the premises, and that present also were vehicles belonging to ‘problematic farm labour contractors’ or farm labour contractors known to the Director as having violated the *Act* or *Regulation*. The power of entry and inspection set out in section 85 of the *Act* is broadly framed. An entry in respect of a place where work is or has been done which is not a place occupied as a private residence, must be “for the purposes of ensuring compliance with the *Act* or *Regulation*”, and “during regular working hours”. The minimum requirements for the exercise of the power of entry to a site, set out in section 85 of the *Act*, were therefore met.

It was also apparent that Townline also restricted the right of entry or attempted to restrict the right of entry of the Director. Townline argued that the Director was restricted from relying on its right of entry by virtue of a policy meeting with members of the industry, however, Townline cannot justify its refusal to permit an entry to investigate compliance with the *Act* and *Regulation* based on policy statements made at a meeting. Townline further argued that the *Team* did not properly or adequately disclose the reasons entry was sought, or alternatively misrepresented the reasons for entry. The submission of the Townline was not accepted, as credible, or supportable where the entry was clearly authorized by an objective analysis of the facts, and the *Act*.

ISSUE:

Did the Delegate have the power to enter and inspect the site or premises of Townline Growers (1994) Ltd. in the circumstances of this case?

FACTS

I decided this case after considering the written submission of the Employer, and the Delegate.

On October 17, 2002 the Agricultural Compliance Team (“*Team*”) of the Director arrived at a sprout field owned by Townline Growers (1994) Ltd. in Yarrow, British Columbia. At the site, the *Team* identified numerous farm labour contractor vehicles. Three of the vehicles were owned by farm labour contractors who had a history of non-compliance with the *Act* and repeat contraventions of the *Act* and *Regulation*.

An Employment Standards Officer contacted Jerry Alamwala of Townline informing Townline of the Team's need to interview farm contractor employees to ensure that the farm labour contractors working on site were operating in compliance with the Act. Mr. Alamwala refused to grant the Team entry to his property. After the initial refusal, the officer informed Mr. Alamwala that the Team had the right to enter the property during regular working hours, and that a refusal to allow entry would result in a penalty of \$500.00 against any person who restricts entry. Mr. Alamwala continued to deny entry, and indicated that he would rather take the \$500.00 penalty than allow the Team to enter his property.

As a result of Mr. Alamwala's denial of entry to the officer, the Team was unable to determine if the farm labour contractors working at the site were operating in compliance with the *Act* and *Regulation*. The Delegate imposed a \$500.00 penalty pursuant to section 28(b) of the *Act*, after finding that Townline contravened section 46 of the *Regulation* by restricting the Team's right of entry and inspection under section 85 of the *Act*. Townline appealed the imposition of a penalty.

I note that a page of corrections was also issued by the Delegate, and delivered to the Employer following delivery of the Determination. I have reviewed the corrections, and in my view, the corrections do not in any material way effect the substance of the Team's entry or the Employer's denial of entry of the Team to the premises.

Employer's Argument:

The Employer submits that the Determination should be cancelled because:

- 1) No Determination Number was attributed to either the initial or the "revised determinations as outlined in the Appeal process.
- 2) Mr. Kaila misrepresented the reason for the inspection and admitted this verbally over the phone. When asked to reschedule the visit, Mr. Kaila was unwilling to work co-operatively in re-scheduling.
- 3) The inspection goes against policy outlined by the Director of Employment Standards at the May 15, 2002 public agriculture meeting. It was indicated that "focus group FLCs and growers" would be targeted for multiple visits during the season and "non-focus group FLCs and growers" may be inspected once during the season, if time allowed. Townline Growers (1994) Ltd. was previously visited this year by the enforcement team on July 9, at which time I gave them my full cooperation. I was not advised of any contravention or problems encountered during this visit.

In regards to the second Oct. 17 visit, Mr. Kaila stated that neither myself or my contracted FACS were part of the targeted "focus group". In fact, the revised Determination listing Subedar Contractors Ltd. completely removes any reference to any core contravention for this particular FLC.

The Employer further submits that the Team was unwilling to work with industry, and that such an investigation is a waste of grower's time, and that the Branch should make appointments to exercise its entry powers or alternatively exercise entry powers during the meal or work breaks of employees. The Employer submits that the enforcement team was "maybe trying to increase its reported number of core contravention(s) in order to justify its existence, initiating site visits based on rumor and innuendo." Townline says that "blatant misrepresentation of facts" demonstrates the unwillingness of the Team to work with industry, at a time when the industry was attempting to negotiate changes to "eliminate

irrelevant and obtrusive regulations”. Townline submits that the attempted entry was a “fishing expedition”.

Townline argues that he asked the Employment Standards Officer to return at a different time as his wife was unable to accompany the enforcement team and he was engaged in the construction of a major engineering project. He says that when the officer told him he would be fined, and fined again the next day of entry was refused, he said he would rather be fined than allow the team to enter onto his property.

Delegate’s Argument

The Delegate says that the lack of a determination number is not an error which justifies the cancelling of a Determination. The Delegate further says that the reasons for the site visit were in respect to an investigation regarding non-compliance with the minimum piece rate and minimum wage requirements in the Brussels sprout and broccoli industry in general. The Delegate says that the reasons were not misrepresented to Townline. The Director says that it was only after arriving at the site, that the site was identified as the property of Townline, and that farm labour contractors were identified by vehicle licence numbers present on vehicles proximate to the site and on the site. As a result of the denial of entry the Team was unable to verify the presence of contractors, or compliance with the *Act*. The Delegate further says that the only reference to rescheduling was when Mr. Alamwala repeatedly stated that the team should return in one weeks time at which time he would have no workers on site as he would be replacing the workers by machine harvesting the crops. The Delegate says that it had the right to enter and inspect the property during regular working hours, and that the Employer was informed of this right. The Delegate says that if a penalty is not issued in these circumstances there is no disincentive for employers to frustrate investigations.

ANALYSIS

I note that the legislature has established a scheme for regulating farm labour contractors, farmers and protecting the employment standards rights of agricultural workers. The reasons for such regulation are set out in part in Mark Thompson’s report (Rights and Responsibilities in a Changing Workplace, A Review of Employment Standards in B.C.) issued prior to the enactment of the *Act*. Some of arguments raised by the appellant are matter of “policy or politics”, and the process under this *Act* is an appeal process. In an appeal under the *Act*, the burden rests with the appellant, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

It is apparent from the facts set out above, that Townline had workers engaged in work on site. It is also apparent that the Director conducted the investigation because it had a complaint related to a violation of the *Act*. It is also apparent that there were vehicles on Townline’s site or proximate to Townline’s site that belonged to farm labour contractors, some of whom had a history of non-compliance with the *Act*. It is apparent that the Delegate attempted to enter the site during regular working hours. It is also apparent that Townline refused entry to the site. Section 76 of the *Act* makes an investigation mandatory where a complaint is received, unless certain circumstances apply, none of which concerns us here. The Director is also empowered to investigate without receiving a complaint - see section 76(3) of the *Act*.

I note that there is a discrepancy between the facts advanced by the appellant and the facts set out in the Determination relating to “reasons for refusal” of entry. The appellant alleges, in essence that he was busy, and could not assist the Delegate by being present when the entry took place. The Delegate suggests

that the only information communicated by Mr. Alamwala was that the entry should take place at a later time when there were no workers on site. It is unnecessary for me to resolve this conflict in the facts. Even if the facts alleged by the appellant are correct, this would not afford any excuse for Townline's failure to permit an entry. The convenience of Townline is not a factor that should be considered in determining whether the right of entry exists, and whether the right of entry was restricted. Limiting the right of the Delegate to inspect "upon making an appointment", or at the "convenience" of the farmer, or in the presence of the farmer, would thwart the purpose of an investigation.

Section 85 of the *Act* contains broad entry and inspection powers, and the right of entry is not contingent upon receipt of a complaint, but rather on "ensuring compliance with this Act". The right of entry can be exercised whether the Director or Delegate has received a complaint, or whether the Director has initiated an investigation without a complaint. The full text of section 85 of the *Act* is set out below:

- 85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
- (a) enter during regular working hours any place, including any means of conveyance or transport, where;
 - (i) work is or has been done or started by employees,
 - (ii) an employer carries on business or stores assets relating to that business
 - (iii) a record required for the purposes of the Act is kept, or
 - (iv) anything to which this Act applies is taking place or has taken place;
 - (b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;
 - (c) inspect any records that may be relevant to an investigation under this Part;
 - (d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
 - (e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
 - (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c)

There is no suggestion in the *Act* that a Delegate must have "reasonable and probable grounds" for believing an offence or breach of the *Act* or *Regulation* has occurred, before the Delegate can exercise a right to entry under section 85 of the *Act*. In this case, the Delegate was responding to third party information from farm labour contractors and workers regarding non-compliance with the minimum piece rate and minimum wage requirements in the "Brussels sprout and broccoli industry", and this was the reason for the site visit. In my view, this is a sufficient connection to fall within the meaning of the phrase "ensuring compliance with this Act and the regulations". I note that I am not concerned, in this case, with an entry to a "place occupied as a private residence", which requires an entry with a warrant issued under section 120 of the *Act*.

Section 46(2) of the *Regulation* provides:

No person may restrict or attempt to restrict the director from making an entry under section 85(1)(a) of the Act.

The penalty for failure to comply with section 46 (2) is the amount of \$500.00, as specified in 28(b) of the *Regulation*.

Failure to Specify Reasons for Entry or Misrepresenting Reasons for Entry:

Townline submits that the Delegate failed to specify reasons for entry or misrepresented reasons for entry. The Delegate disputes that there was a failure by the Team member to specify the reasons for entry or that the Team misrepresented the reasons for entry. It seems improbable that the Director would not give a reason for the entry when it had a clear right to enter, and objectively there were grounds to conduct an investigation given that there were workers present, and farm labour contractors apparently present on the site, and given the delegate was investigating a complaint about payment for sprout work. I do not accept the submission by Townline with regard to this failure. It is not in accordance with the preponderance of probabilities, and the existing conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (C.A.). I particularly consider that Townline referred to its preference to accept a penalty rather than to permit entry. This seems to support the version of facts given by the Delegate, that the Team particularly informed Townline of the nature of the investigation, the right to enter under section 85, and the consequences of denying entry.

Nevertheless, I note that the right to enter a place where work is performed does not rest on any reasons given to the farmer. This is distinct from the entry of a dwelling house under section 85(2) which requires entry with a warrant issued under section 120 of the *Act*. Presumably, in order to get a warrant the Delegate would have to explain and justify the reasons for entry to a person authorized to issue a warrant. In my view, the Delegate is not required under section 85 to “explain” or “justify” the reasons for entry to a farmer prior to entering a work site, however, it is likely good practice to do so. Here, not only did the Delegate give an explanation of reasons for entry, but the Delegate also attempted to educate the farmer as to the power to enter, and the penalty consequences of restricting, or attempting to restrict, entry of the Delegate.

In certain circumstances, the failure to provide reasons to the farmer may raise the issue of whether the inspection was the *bona fide* exercise of a power to enter to ensure compliance with the *Act* and *Regulation*. Section 85 contains a broad power of entry, inspection and investigation. On any objective analysis of the facts, and the Determination it is apparent that work was being performed on the site [section 85(1)(a)(i) of the *Act*], that the attempt to enter was made during regular working hours [section 85(1)(a) of the *Act*], and that the entry was made for the purpose of ensuring compliance with the *Act* and *Regulations* [section 85(1) of the *Act*]. These are the only requirements necessary for the Delegate to establish its right to enter premises or sites other than a dwelling house. The Delegate has established these requirements in the Determination, and the submission of Townline does not contradict these grounds. It is also plain that on either the facts alleged by the Delegate or the facts alleged by the farmer, that Townline restricted the entry of the Delegate from the site.

Industry Meeting:

The appellant alleges that the Determination should be set aside because a representative of the Branch, met with the industry and agreed to limit its investigatory power to one site visit per year unless the farmer or farm labour contractor was part of a target group. The Delegate does not deny that the meeting took place as alleged by Townline. If the meeting of the industry took place as suggested by Townline, this “statement of policy” does not curtail the rights of the Delegate under section 85 of the *Act*, or afford

Townline any excuse for its denial of the Director's right of entry for the purposes of ensuring compliance with the *Act* or investigating a complaint. The power to enter and investigate are powers which are set out in the *Act*. If the Director chooses not to exercise those powers, that is a matter for the Director, and this does not invest in any farmer the right to refuse an entry to a person otherwise empowered to enter and investigate.

Failure to Specify a Determination Number:

I note that there is nothing in the *Act*, which would warrant the setting aside of a Determination on the basis of the failure of the Delegate to set out a Determination number. Determination numbers may be of assistance to the Director for administrative reasons. The Determination in this case complies with the requirements set out in section 79, and 81 of the *Act*. The Determination clearly sets out the facts on which the Delegate imposed the penalty, including the sections of the *Act* and *Regulation* violated by Townline.

For all the above reasons, I dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated October 18, 2002 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal