

An appeal

- by -

Balwinder Grewal and Harvinder Grewal o/a P&M Farms
("P&M")

- 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 Groves

FILE No.: 2005A/205

DATE OF DECISION: February 21, 2006

DECISION

OVERVIEW

1. This is an appeal by Balwinder Grewal and Harvinder Grewal o/a P&M Farms (“P&M”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on October 27, 2005. In that Determination, the Delegate found that P&M had contravened Section 28 of the *Act*, which requires employers to keep payroll records for employees. Pursuant to Section 79(a) and (b) of the *Act*, the Delegate ordered P&M to cease contravening Section 28 and to comply with all other requirements of the *Act* and the *Employment Standards Regulation* (the “Regulation”). Finally, the Delegate ordered that P&M pay an administrative penalty of \$500.00, under the authority of Section 29(1)(a) of the *Regulation*.
2. P&M filed its appeal with the Tribunal on November 30, 2005. On December 1, 2005, the Tribunal wrote to the Delegate, requesting that he forward the record considered by him at the time the Determination was made, and inviting submissions. The Delegate subsequently delivered a letter submission dated December 19, 2005.
3. By letter dated January 3, 2006, the Tribunal invited submissions in response from P&M. No further submissions were received.
4. On January 23, 2006, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received from the parties.

FACTS

5. P&M is a farm producer, conducting agricultural operations at 357 Defehr Road in Abbotsford, British Columbia.
6. On July 29, 2005, the Employment Standards Branch Agriculture Compliance Team (the “Team”) conducted a site visit at the Defehr Road location. Members of the Team observed persons harvesting raspberries at the site. They sought to interview these persons, but permission to do so was refused by Balwinder Grewal, one of the principals of P&M.
7. The Delegate does not appear to have delivered the record to the Tribunal, as requested. However, the Reasons for Determination state that on September 12, 2005, the Delegate issued a Demand for Employer Records to P&M pursuant to Section 85(1)(f) of the *Act*. The Reasons further say that the Demand required P&M to deliver all payroll records to the Branch on or before September 26, 2005. They go on to report that Balwinder Grewal did deliver bank statements and cancelled cheques to the Branch on September 27, 2005, but no payroll records.
8. In subsequent discussions referred to in the Reasons, involving the Delegate, another Branch representative, Balwinder Grewal, and P&M’s accountant, P&M took the position with the Branch that the persons observed harvesting raspberries on the day of the site visit were not employees but relatives and friends of Balwinder Grewal, who were merely giving him a helping hand, and that P&M therefore kept no payroll records in respect of them.

9. Attached to its Appeal Form, P&M provided a submission over the signature of Balwinder Grewal, as follows:

In our Indian culture it is a common tradition, that stems back centuries, that when help or assurance is needed, relatives and friends band together collectively to lend a helping hand. This is called “Aawat”. There is absolutely no discussion of compensation whether it is monetary or anything of that nature for this assistance that family and friends provide from time to time. Only hugs, kisses or handshakes are the types of acknowledgement we receive. It is an issue of respect and cultural commandment if you may; just like in the Catholic Church where one of the 10 commandments, written by God, clearly states that “Do unto others as you would want done unto you”. It is because of these characteristics that make our culture different and what it is today. This is the situation in this case.

ISSUE

10. Was P&M required to keep payroll records in respect of the persons observed to be harvesting raspberries at its farm site on July 29, 2005?

DISCUSSION

11. The jurisdiction of the Tribunal to determine appeals is set out in Section 112(1) of the *Act*, which reads as follows:

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.
12. The Appeal Form filed by P&M bases the appeal on the assertion that the Delegate failed to observe the principles of natural justice when making the Determination. Such a challenge is usually directed at some flaw in the proceedings in their procedural aspect, in the sense that P&M was somehow deprived of the opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.
13. No such failure reveals itself to me on the facts of this case, however. P&M was provided with ample opportunity to address the issue which was of concern to the Delegate – the failure of P&M respond to the Demand for Employer Records in respect of the persons the Team observed harvesting raspberries at the P&M farm site on July 29, 2005. P&M's response was that no payroll records were required to be kept, and therefore none need be produced, because the persons observed were relatives and friends, not employees. There is no evidence that P&M failed to perceive the nature of the issue at hand, or that it was prevented from addressing it appropriately prior to the Delegate's issuing the Determination.
14. The real issue on this appeal is not, therefore, whether the Delegate acted in breach of the rules of natural justice. The real issue is whether the Delegate erred in law in deciding that the persons observed

harvesting raspberries were employees. If they were not, then P&M was not obliged to maintain payroll records in respect of them.

15. P&M's mischaracterization of the grounds of appeal is not fatal. It is in keeping with a purpose of the *Act* to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* that the Tribunal should take a large and liberal view of an appellant's argument as to why a determination ought to be varied or cancelled, or why the matter should be referred back to the Director (see *Triple S Transmission Inc.* BC EST #D141/03). I have decided, therefore, that I should decide P&M's appeal on its real basis, notwithstanding that it checked the wrong box on its Appeal Form.
16. Turning to the merits, the first comment I wish to make relates to the fact that the Delegate does not appear to have provided the Tribunal with the record that was created as a result of his investigation, and on the basis of which he made the Determination. That Determination ordered that P&M pay \$500.00 for failing to respond to a Demand for Employer Records. Such an order is in the nature of a mandatory penalty, and the Tribunal has therefore required strict compliance with the provisions in the *Act* relating to service of Demands, so that it may be satisfied that the order is justified. When, as here, no record is produced, the Tribunal is left to infer that proper service of the Demand for Employer Records was, in fact, effected. If the complete record were to be disclosed, however, no such difficulty should arise, as the record would be expected to include not only a copy of the Demand, but also any documentary support for the steps taken to ensure that the Demand was served in accordance with the requirements of the *Act*.
17. While I was troubled by the absence of evidence from the Delegate supporting a finding that the Demand for Employer Records was properly served on P&M, I have nevertheless concluded from the material that has been provided to me that P&M did, in fact, receive it. This is apparent from the fact that P&M did purport to respond in a manner consistent with its having had notice of the Demand, when it submitted to the Delegate that it was unnecessary to keep payroll records in respect of the persons observed to be harvesting raspberries at P&M's farm site on July 29, 2005 because they were merely relatives and friends giving a helping hand, and not therefore employees.
18. This, then, brings us to the issue at hand: did the Delegate err in law in deciding that the persons observed harvesting raspberries were, in fact, employees?
19. The provision of the *Act* which is engaged when considering this issue is the Section 1 definition of "employee". The definition is broad, in keeping with an inclusive approach to what constitutes employment for the purposes of the *Act*. Of significance for this case, the definition includes this:
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee
20. Harvesting raspberries is an activity one would normally expect an employee engaged in farm work to perform. It is an activity that must have resulted in real economic benefit to P&M. No one can deny that it involved labour or services, the criteria for establishing the activity as "work" for the purposes of the *Act*.
21. P&M argues that the persons involved were not employees; they were relatives and friends who were merely providing a helping hand. The essence of this submission is that there was no intention to create an employment relationship in the circumstances. That may be so, but it must be remembered that the

existence of an employment relationship is not dependent on the intentions of the parties. It may be established if an employer allows work to be performed which is identifiable as work normally performed in an employment relationship (see *Debra Hantula o/a Cambie Country Garden* BC EST #D277/97).

22. In my opinion, the fact that the persons observed harvesting raspberries by the Team on July 29, 2005 may have been relatives and friends lending a helping hand is insufficient to establish that the Delegate erred in deciding that those persons were employees under the *Act*. It follows that since those persons were employees, P&M was obliged to maintain payroll records in respect of them. Its failure to do so, which led to its inability to respond to the Demand for Employer Records, means that the administrative penalty was properly imposed.

ORDER

23. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert Groves
Member
Employment Standards Tribunal