

An appeal

- by -

Grewal Berry Farm Inc.
(the “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 (as amended)

TRIBUNAL MEMBER: Yuki Matsuno

FILE No.: 2007A/2

DATE OF DECISION: March 22, 2007

DECISION

SUBMISSIONS

Surjit Singh Grewal

for the Employer

Ravi Sandhu

for the Director of Employment Standards

OVERVIEW

1. The Employer, Grewal Berry Farm Inc., appeals a Determination of the Director of Employment Standards (the “Director”) issued December 6, 2006 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. A delegate of the Director (the “Delegate”) found in the Determination that the Employer had contravened section 46 of the *Employment Standards Regulation* (the “Regulation”) by failing to provide the Director with records required by section 85(1)(f) of the *Act*. As a result, the Delegate imposed an administrative penalty on the Employer for contravening section 46 of the *Regulation*, in the amount of \$500.00.
3. The Employer now appeals the Determination on the ground that the Director, represented by the Delegate, failed to observe the principles of natural justice.
4. On its appeal form, the Employer indicates it believes an oral hearing to be necessary, but provides no explanation for its belief. The Tribunal has reviewed the appeal and has decided that the appeal will be decided on the basis of written materials only. In making this decision, I have before me the Employer’s appeal form and submission; the Determination; the Director’s submission; and the Record.

ISSUE

5. Did the Director fail to observe the principles of natural justice in making the Determination?

BACKGROUND

6. The Agriculture Compliance Team (the “ACT”) conducted a site visit at a blueberry farm owned by the Employer on July 13, 2006. The purpose of the visit was to ensure compliance with the *Act* and *Regulation* with regard to farm labour contractors, producers, and farm workers. During the site visit, the ACT interviewed nine employees who identified the Employer as their employer. On September 6, 2006, a delegate of the Director issued the Employer a Demand for Records pursuant to section 85(1)(f) of the *Act* (the “Demand”). The Demand required the Employer to disclose, produce and deliver all employment records for all employees, for the period January 1, 2006 to August 31, 2006. The Demand required the following payroll records:
 - any and all payroll records relating to wages, hours of work and conditions of employment as specified in Section 28 of the *Act*;

- all direct deposit information, cancelled cheques and bank statements; and
- daily logs as required under section 6(4)(5) of the *Regulation* including the volume or weight of fruit, vegetable, berry of flower crop picked in each day by each worker.

7. The Demand required the Employer to produce the documents on or before September 20, 2006. The Demand also contained the following paragraph, in bold print:

Failure to produce these records as required will result in a Determination being issued. Where a contravention is found in a Determination an escalating administrative penalty will be imposed under Section 29 and 46 of the Employment Standards Regulation (minimum \$500.00).

8. The Employer submitted some documents on or before September 20, 2006. On September 27, 2006, a delegate of the Director informed the Employer by letter that the submitted documents had been reviewed and that a number of contraventions of the *Act* and *Regulation* had been found, one of them being that no payroll records were submitted for three out of the nine employees interviewed by the ACT during their site visit in July. The letter also stated:

Should you disagree with these findings, please provide the Delegate of the Director all documents on which you rely to support your position. To be considered your written reply must be received by this office no later than **October 10, 2006**.

....

Should you fail to reply, in writing, by the above date, or your written response does not result in a substantive change, a determination shall be issued, without further notice to you based on the information on file. A penalty will also accompany the issuance of a determination.

9. A letter sent to the Employer by a delegate of the Director on October 5, 2006 indicated that an Employment Standards Officer had agreed to a request by the Employer's accountant for an extension of the response date, until October 20, 2006. The letter went on to say:

Should you fail to reply, in writing, by October 20, 2006, or if your written response does not result in a substantive change, a determination shall be issued, without further notice to you based on the information on file. A penalty will also accompany the issuance of a determination.

10. On October 20, 2006, the Employer's accountant hand delivered a package to a delegate of the Director that included payroll summaries and cash receipts for the three employees who were missing from the employment records submitted by the Employer on September 20, 2006. On November 20, 2006, a delegate of the Director received a letter from the Employer, giving the following explanation with respect to the three employees:

1. Section 28 of the Act – Payroll Record Requirements

The three employees, namely, [names omitted], did not appear in our payroll as they were not regular employees and they were part-time employees. They were paid cash wages.

11. Section 46 of the *Regulation* states:

46(1) A person who is required under section 85(1) (f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.

12. In the Determination, the Delegate found that this regulation was breached when the payroll records for all employees were not submitted as required by the Demand. The Delegate explained:

Section 2(a) of the Act states that one of its purposes is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. This can often only be determined through an investigation and inspection of records the Act requires employers to keep and to deliver to the delegate when a request for production is made. Failure to deliver a record, at the very least, delays investigation. It may deny an employee a minimum employment standard. The records demanded were relevant to an investigation, the employer was aware of the demand for production of records, and the records were not delivered.

13. The Delegate ordered the Employer to cease contravening section 46 of the *Regulation* and to comply with all requirements of the *Act* and *Regulation*; further, he imposed a penalty of \$500.00 pursuant to section 29(1) of the *Regulation*.

ARGUMENT AND ANALYSIS

14. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled. The Employer appeals on the basis that the Director failed to observe the principles of natural justice in making the Determination.

15. An appeal on this ground suggests a procedural defect, amounting to unfairness, in how the investigation was carried out or how the Determination was issued. Procedural defects such as the following may amount to a failure to observe the principles of natural justice: the employer was not informed of the case against it; the employer was not allowed an opportunity to respond; or the person or persons carrying out the investigation or issuing the determination were biased.

16. In its submission, the Employer indicates that the three employees' employment records were not included in the batch of documents delivered on September 20, 2006, pursuant to the Demand, because they worked part-time, were not regular employees, and were paid in cash. The Employer argues that all documents were eventually provided to the Branch. However, it should be noted that not all documents were supplied as and when demanded by the Director, i.e. on or before September 20, 2006.

17. The Delegate says in his submission that the Employer's arguments are the same as those presented before the Determination was made, and this is borne out by my examination of the Employer's submission and its letter to the Director of November 20, 2006. It is well established in Tribunal jurisprudence that an appeal of a Determination is not another opportunity to have the case heard on the merits. The Delegate goes on to argue, ". . . the Director is of the view that a disincentive is needed to promote compliance with the Act and to prevent a repeat contravention."

18. I find nothing in the submissions of either party or in the Record that suggests the Director failed to observe the principles of natural justice. With respect to the Demand, it clearly applied to all employees, regardless of their employment status or how they were paid, and required the documents to be delivered on or before September 20, 2006. When this requirement was not complied with, it became open to the

delegate of the Director to find, as he did in the Determination, that the Employer contravened section 46 of the *Regulation* and to consequently require the Employer to cease contravening section 46 and to comply with all requirements of the *Act* and the *Regulation*. Once a contravention of the *Act* or *Regulation* has been found, and a requirement imposed under section 79 of the *Act*, section 98 of the *Act* obliges the Director impose an administrative penalty in accordance with section 29 of the *Regulation*:

98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

(1.2) A determination made by the director under section 79 must include a statement of the applicable penalty.

19. As the Tribunal has repeatedly decided, the Director has no discretion with respect to imposing an administrative penalty in these circumstances: see *Kamal Farming Ltd.*, BC EST #D089/06; *Ponderosa Motor Inn*, BC EST #D011/06; *N. & G. Retail Inc.*, BC EST #D012/06. Further, administrative penalties are part of a larger statutory scheme designed to regulate conditions of employment in British Columbia and are generally consistent with the purposes of the Act, including the purpose of ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment: see *Summit Security Group Ltd.*, BC EST #D133/04, reconsideration of BC EST #059/04. As the Delegate points out, upholding these basic standards can often only be done through an investigation and inspection of the records that the *Act* requires employers to keep and to deliver to the delegate when a request for production is made. In this case, the Employer failed to comply with the request.
20. In my view, the Determination was made properly and the administrative penalty imposed correctly. There is no indication that the principles of natural justice were not observed throughout. This appeal does not succeed.

ORDER

21. Pursuant to Section 115 of the *Act*, I order that the Determination dated December 6, 2006 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal