

An appeal

- by -

Maan Farms Ltd.

- 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: Carol-Ann Hart

FILE No.: 2009A/166

DATE OF DECISION: April 12, 2010

DECISION

SUBMISSIONS

Devinder Kaur Maan and Khushvinder Singh Maan on behalf of Maan Farms Ltd.

Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Maan Farms Ltd., pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director of Employment Standards (the “*Director*”) issued on November 23, 2009 (the “*Determination*”).
2. The Delegate of the Director (the “*Delegate*”) determined that Maan Farms Ltd. had contravened s. 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to produce records as required by the Director. The Delegate imposed a penalty under section 29(1)(c) of the *Regulation* in the amount of \$2500.00.
3. The appellant, Maan Farms Ltd., contends that the Determination should be cancelled because the Delegate failed to observe the principles of natural justice.
4. The Tribunal may hold any combination of written, electronic and oral hearings. (See Section 36 of the *Administrative Tribunals Act*, which is incorporated into the *Employment Standards Act* (by section 103), and Rule 17 of the Tribunal’s *Rules of Practise and Procedure*). In this case, no one has made a request for any particular type of hearing. After reviewing the material before me on this appeal, I have concluded that the appeal can be properly addressed through the written documentation and submissions.

ISSUE

5. The issue to be determined in this case is the following:

Was the penalty properly imposed against Maan Farms Ltd. for failing to produce records as required by the Director?

THE FACTS

6. The Delegate issued a Demand for Records dated October 23, 2009 (the “*Demand*”) to Maan Farms Ltd., so that a payroll audit could be conducted. Maan Farms Ltd. was required under the Demand to deliver the specified records to the Employment Standards Branch Office on or before November 6, 2009.
7. The Demand required that Maan Farms Ltd. “*disclose, produce and deliver all employment records for: ... All employees for the period from January 01, 2009 to September 29, 2009*”. The Demand further specified as follows:

The payroll records required are:

1. Any and all payroll records relating to wages, hours of work and conditions of employment as specified in Section 28 of the *Employment Standards Act*.
2. Any and all cancelled cheques and bank statements related to the payment of wages.

8. As of the date of the Determination, November 23, 2009, the records outlined in the Demand had not been delivered to the Branch.

ARGUMENT

For the Appellant

9. In a letter dated December 30, 2009, accompanying the Appeal Form, the appellant maintained that it was “not able to go to Canada Post in a timely manner, or receive the letter” and was therefore “...unable to declare its records within the time limit set by the Branch delegate”. Devinder Kaur Maan explained in that letter that the owners of Maan Farms Ltd. were busy with an important family cultural function, and the farming season for Maan Farms Ltd., which ran until October 31, 2009. Following the end of the farming season, additional time was required for cleaning, organization, and preparation for the winter months. The appellant further indicated that due to the rural location of the operations of Maan Farms Ltd., travel was required in order to pick up the letter from Canada Post. The appellant submitted that the Tribunal should consider factors such as life circumstances in making its decision.
10. When the demand was received by Maan Farms Ltd., Khushvinder Singh Maan had contacted the Delegate on November 17, 2009, to request an extra two to three weeks to provide the records. Maan Farms Ltd. was willing at all times to co-operate and to provide the records requested by the Delegate. The Delegate had denied the extension of time to submit the records.
11. The appellant further noted that in 2008, it had delivered its records in a timely manner in response to a request by the Employment Standards Branch because the farm season was complete in December when the request was sent for that year. Maan Farms Ltd. had not expected a letter from the Employment Standards Branch until December of 2009.
12. The appellant submitted copies of information concerning tours of the Maan Farms in the Fall of 2009 and a copy of a Receipt of Payroll Records form dated December 7, 2009.

For the Director

13. The Delegate submitted that the arguments presented by Maan Farms Ltd. on appeal were the same arguments which had been considered by the Delegate before issuing the Determination. All of the arguments had been addressed in the Determination.
14. The Delegate maintained that, by explaining why it had failed to comply with the Demand, the appellant had acknowledged that it had contravened the *Act*. The Delegate submitted that the appeal should be denied to promote compliance with the *Act* and to prevent a repeat contravention.

ANALYSIS

15. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision 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.

16. An appeal must be based on one or more of the statutory grounds of appeal. It is not an opportunity to merely present to the Tribunal the arguments already made before the Delegate, and request that the Tribunal arrive at a different conclusion.
17. In this case, the appellant alleges that the Delegate failed to observe the principles of natural justice in making the Determination. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. The arguments made by the appellant do not set out any issues of this nature which would suggest a denial of natural justice by the Delegate.
18. Although no other grounds for appeal were specifically indicated on the Appeal Form, the Tribunal will review the submissions and consider the true nature of the appeal, regardless of the particular box checked-off by the appellant on the Appeal Form. (See *Triple S Transmission Inc.*, BC EST # D141/03, and *Re Flour Child Bakeries Corp.*, BC EST # D094/06). Other grounds of appeal which are apparent from the submissions may be addressed.
19. Section 46(1) of the *Regulation* provides as follows:

Production of records

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.

20. Section 85 of the *Act* provides in part as follows:

Entry and inspection powers

85(1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

- (c) inspect any records that may be relevant to an investigation under this Part;...
- (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

21. It is clear that the Delegate had authority to require Maan Farms Ltd. to provide the records requested for inspection under section 85(1) of the *Act*, and pursuant to section 46(1) of the *Act*, the appellant was required to deliver the records.
22. Section 46 of the *Regulation* provides that records must be delivered as and when required. It is undisputed that the appellant did not submit the records in accordance with the Demand. The Receipt of Payroll Records document provided by the appellant shows that the records were finally submitted on December 7, 2009, which was well after the Determination was issued.
23. Much of the argument of the appellant on appeal relates to the reasons for which the records were not produced by the date and time required by the Director, (November 6, 2009 at 2:00 p.m.). These arguments were made by the appellant, and considered by the Delegate before the Determination was issued. The Tribunal has established in prior decisions that an appeal is not an opportunity to present the same arguments to the Tribunal which were already considered by the delegate (See *Re Lentz*, BC EST # D072/07, and *Re Masev Communications*, BC EST # D205/04).

24. Based on the wording of section 46 of the *Regulation* and section 85(1) of the *Act*, a Demand for records may be made at any time, and unfortunately, the timing of such a Demand may not be convenient for the recipient. There is no provision of the *Act* or *Regulation* which would permit the Tribunal to provide relief from the failure to comply with the Demand based on the individual or personal circumstances of the agents for Maan Farms Ltd.
25. Section 122 of the *Act* is the relevant provision concerning service of the Demand by the Director. That section provides as follows:
- Service of determinations, demands and notices***
- 122(1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.
26. The Canada Post tracking records provided by the Delegate show that the Demand was issued and sent by registered mail on October 23, 2009, and it arrived at the Mount Lehman Post Office on October 27, 2009. On that same day, October 27, 2009, a notice card was left for Maan Farms Ltd. indicating where the package could be picked up. The Canada Post tracking records show that on November 13, 2009, the Demand was successfully delivered, and signed for.
27. Pursuant to section 122(2) of the *Act*, the Demand was deemed to be served 8 days after it was deposited in the Canada Post Office, which would have been October 31, 2009. On the date service was deemed, the appellants would have had a one-week period in which to provide the documents requested.
28. The agent for the appellant attended at the Canada Post office to sign for the registered mail envelope containing the Demand approximately one week after the deadline to provide the records had passed. This was about 17 days after the notice card was left for Maan Farms Ltd., and about 13 days after Maan Farms Ltd. was deemed to have been served under section 122(2) of the *Act*.
29. If a person fails to pick up registered mail in a timely manner, it is at his or her own peril where legislative deemed service provisions are applicable. (See the decision of the Supreme Court of B.C. in *Whitta v. McSheffrey*, Unreported, (August 15, 1995), Nanaimo Registry, No. S10398; and the decisions of the Tribunal in *Re #1 Low-Cost Moving & Hauling Ltd.*, BC EST # D484/02, and *Re Nature's Choice Foods Ltd.*, BC EST # D206/04). The consequences of section 122 of the *Act* cannot be avoided by failing or neglecting to pick up registered mail in a timely manner.
30. For all of the above reasons, I do not find that the Director failed to observe the principles of natural justice, or that there was any error in law in making the Determination. The penalty was appropriate, and the appeal is dismissed.

ORDER

31. I order pursuant to Section 115 of the *Act*, that the Determination dated November 23, 2009, be confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal