Employment Standards TRIBUNAL

An appeal

- by -

Earlco Holdings Ltd.
("Earlco")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/43

DATE OF DECISION: June 15, 2011

DECISION

SUBMISSIONS

John Lawrence	on behalf of Earlco Holdings Ltd.
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Earlco Holdings Ltd. ("Earlco") of a Determination issued against it on March 10, 2011, pursuant to which it was assessed a $500 monetary penalty under section 98 of the *Employment Standards Act* (the "*Act*") for having contravened section 13 of the *Act*.

2. Section 13(1) of the *Act* states: "A person must not act as a farm labour contractor unless the person is licensed under this Act." A "farm labour contractor" is defined in section 1 of the *Act* as follows: "*farm labour contractor* means 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".

3. Further provisions relating to "farm labour contractors" are set out in Part 2 of the *Employment Standards Regulation* (the "*Regulation*"). Section 9(1) of the *Regulation* states that a farm labour contractor's licence is only valid for one year although subsection 9(2) authorizes the Director of Employment Standards (the "Director") to issue a licence for a 3-year term provided certain regulatory criteria are met.

4. In a letter to the Employment Standards Branch (the "Branch") dated March 17, 2011, Mr. John Lawrence, Earlco's president, described Earlco's operations as follows:

> [Earlco] is a small family owned company that purchased a vineyard in Penticton in 2003…Based on our viticulture experience we have been asked by others investing in the growing wine industry in the Province, primarily non-residents of British Columbia, to maintain their vineyards. We have responded to these requests and made significant investment in tractors and equipment. We currently provide full time employment for three individuals residing in the Penticton area and engage up to 15 seasonal employees during the growing season. To this end we licensed the Company under the Act in June 2008.

5. On July 23, 2008, the Director issued a farm labour contractor's licence to Earlco for a 1-year term expiring on July 29, 2009. The Branch received information that, notwithstanding the expiration of its licence, Earlco continued to operate as a farm labour contractor and, accordingly, commenced an investigation into the matter (see *Act*, section 76(2)). On February 25, 2011, the Branch wrote to Earlco advising that its investigation disclosed that Earlco had continued to operate as a farm labour contractor after its licence expired. The Branch asked for Earlco's written response to this preliminary finding by no later than March 10, 2011.

6. Earlco replied by letter dated February 26, 2011, under Mr. Lawrence's signature. In this letter Mr. Lawrence stated: "We concur with the content of your [February 25, 2011] letter and confirm that the Company allowed, unknowingly, FLC licence # 156-568/09 to lapse and therefore contravened Section 13(1) of the Act. We apologise for our error and respectfully request that the company be permitted to rectify the situation through appropriate remedial action."

7. In light of its clear admission of the section 13 contravention, the Director levied a $500 monetary penalty by way of the Determination now before me. Earlco appeals the Determination on the grounds that the Director erred in law, and otherwise failed to observe the principles of natural justice, in making the Determination (see *Act*, subsections 112(1)(a) and (b)).

EARLCO'S SUBMISSIONS

8. Earlco says that the Determination should be cancelled. First, it says that the Director erred in law because, during the time in question, Earlco was not operating as a farm labour contractor and thus could not have contravened section 113 of the *Act*:

> [Earlco] manages its own vineyards and also enters into Vineyard Management Agreements with third parties. These agreements require all annual operating decisions and procedures to be made by Earlco. Earlco is not in the business of providing labour to work for, or, under the direction of owners. Therefore, Earlco's vineyard Management Agreements do not fall under the definition of a Farm Labour Contractor…

9. Second, Earlco says that its previous licence was "constructively renewed" since the security (apparently, a $10,000 irrevocable letter of credit) it initially provided to the Director (see *Act*, sections 5 and 5.1) was not surrendered by the Branch immediately after the licence expired. Earlco also says that the Branch's failure to notify Earlco that its licence was about to expire, coupled with the Branch's retention of the letter of credit (which involved a continuing expense for Earlco – presumably in the form of "stand-by" fees) constituted a breach of the principles of natural justice.

THE DIRECTOR'S REPLY

10. The Director says that Earlco clearly meets the section 1 definition of a "farm labour contractor" since its employees were working "for" vineyard owners when they were harvesting these owners' grapes and carrying out other related tasks.

11. With respect to the issues raised regarding the letter of credit, the Director notes that it is his policy to retain letters of credit for up to 6 months after the expiration of the licence since this is the time frame within which a contractor's employees might file an unpaid wage complaint (see *Act*, section 74). The Director also notes that the letter of credit is not the licence itself but, rather, a security requirement attached to the issuance of a licence.

FINDINGS AND ANALYSIS

12. While I agree that Earlco's employees were apparently not working under the explicit direction and control of the vineyard owners who contracted with Earlco for harvesting services, the definition of "farm labour contractor" covers both the situation where the contractor's employees are supervised and directed by the farmer and where the supervision and control rests with the contractor. Either way, the contractor's employees are working "for" the farmer in the sense that the farmer benefits from the employees' services and, indeed, subsection 13(2) of the *Act* deems a contractor's employees to also be employed by the farmer where, as here, the contractor is unlicensed.

13. Earlco appended a sample "Vineyard Management Agreement" to its appeal form. Pursuant to this agreement, Earlco agrees to supply labour to undertake a broad range of activities on the vineyard owner's behalf including inspection, pruning, spraying and other pest control and harvesting. This is the sort of work

that the vineyard owner would normally undertake on its own but for the agreement. In exchange for the contractor's services (including, particularly, the services rendered by the contractor's employees), the vineyard owner agrees to pay a fixed "base fee" as well as a further fee based on a revenue sharing formula. In my view, it is simply not tenable to suggest that the contractor's employees are not providing labour for the vineyard owner's benefit. The contractor's employees were clearly "working" in the sense that they are providing "labour or services" for the benefit of both the contractor (by allowing the contractor to meet its contractual obligations under the Vineyard Management Agreements) and the vineyard owner (by allowing the vineyard owner to generate revenue from its vineyards).

14. I am not persuaded that a farm labour contractor's licence can be "constructively renewed". Earlco has not provided any authority for such a proposition and I am not aware of any Tribunal or judicial decision to that effect. I can appreciate, at least to a minor degree, Earlco's frustration in not having received any formal notification from the Employment Standards Branch about the impending expiration of its licence – individuals have perhaps come to expect that they will receive notification from various government agencies that, for example, their automobile insurance, driver's licence or even an animal licence is about to expire. On the other hand, since the licence in question was apparently issued for 1-year period, Earlco in effect had notice from the outset that its licence would expire on a particular date and, accordingly, it should have diarized the matter to ensure that it made a timely application for renewal. There is no provision in the *Act* requiring the Director to give licensees "renewal notices".

15. The letter of credit is an entirely separate matter from the licence itself although, obviously, the two items are connected in terms of the *Act*'s licensing scheme since a licence will not be issued without security being posted (*Act*, section 5(2)). However, the obligation to obtain a licence rests with the farm labour contractor itself. Section 13(1) of the *Act* clearly mandates that a person must not act as a labour contractor without a proper licence. As and from July 30, 2009, Earlco no longer had a valid licence and the Director never advised Earlco that it was *not* required to renew its licence or that its existing licence was being (indefinitely) extended. In other words, this is not a case where some sort of "estoppel" argument can be successfully advanced nor is it a case of "officially induced error" – see *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] 1 SCR 420.

16. In my view, if Earlco believed that the Director was improperly continuing to hold its letter of credit, it ought to have taken affirmative steps to address that issue rather than simply ignoring the matter altogether. Had it taken timely steps to deal with the letter of credit, it undoubtedly would have been advised to renew its licence if it wished to continue acting as a farm labour contractor and thus might well have avoided being penalized. That said, I wish to reiterate my earlier observation that the Director has no affirmative duty to advise licensees that their licences are about to expire.

17. In its May 24, 2011, submission to the Tribunal Earlco says (at page 3) that it "operated under the assumption the Branch's retention of the letter of credit extended its licence period". For my part, I find it hard to conceive how Earlco could have reasonably come to that conclusion and I am quite surprised that it apparently took no steps whatsoever to confirm whether its assumption (which I consider to be a wholly unreasonable one) was accurate. Earlco did, after all, have clear notice that its licence would expire on July 29, 2009, and the Branch *never* provided Earlco with any notice to the contrary.

18. I have reviewed the record before me and, having done so, am fully satisfied that the Director conducted itself fully in accordance with the principles of natural justice in carrying out his investigation and in making the Determination. Once the Director learned of a possible licence infraction it made certain inquiries, provided Earlco with a summary of the preliminary findings, and gave Earlco a fair opportunity to respond (and Earlco did so). Earlco appears to be suggesting that the Director should not have levied a penalty since

Earlco did not intentionally flout the licensing regime. That may be so, however, the facts before me show that Earlco did contravene section 13 of the *Act* and that it was properly penalized for that contravention. There is nothing in the *Act* requiring the Director to prove a respondent's *intention* to breach section 13 of the *Act*. In other words, section 98 monetary penalties are not *mens rea* offences.

19. I am not satisfied that the Director erred in law or otherwise breached the rules of natural justice in levying a $500 monetary penalty in this case and thus Earlco's appeal is dismissed.

ORDER

20. Pursuant to section 115(1) of the *Act*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal