Employment Standards TRIBUNAL

An appeal

- by -

Mainland Farm Labour Supply Ltd.
("Mainland")

- 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: David B. Stevenson

FILE No.: 2006A/38

DATE OF DECISION: May 12, 2006

DECISION

SUBMISSIONS

D. Dhaliwal	on behalf of Mainland Farm Labour Supply Ltd.
Ravi Sandhu	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Mainland Farm Labour Supply Ltd. ("Mainland") of a Determination that was issued on February 6, 2006 by a delegate of the Director of Employment Standards (the "Director"). The Director found that Mainland had contravened Sections 6 and 40 of the *Employment Standards Regulation* (the *"Regulations"*) and imposed administrative penalties under Section 29 of *Regulations* in the amount of $1000.00.

2. The appeal says the Director erred in law and failed to observe principles of natural justice in making the Determination and asks that it be cancelled or, alternatively, that the administrative penalties be removed and replaced by a warning.

3. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

4. The issue is whether Mainland has shown the director has erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

5. Mainland is a farm labour contractor under the *Act*, having been licensed as such in May 2005.

6. The Determination notes that on July 29, 2005, the Agriculture Compliance Team conducted a site visit to Harry Bros. Farm in Abbotsford, BC for the purpose of ensuring compliance with the *Act* and *Regulations* in respect of any farm labour contractors, producers and farm workers. The Agriculture Compliance Team found Mainland was providing contract labour for Harry Bros. Farm.

7. On October 17, 2005, the Director issued a Demand for Records under Section 85(1) of the *Act*.

8. Based on the site visit and the information acquired through the Demand, the Director concluded Mainland had failed to comply with paragraph 6(4)(e) of the *Regulations*, which requires a farm labour contractor to keep at the worksite and produce for inspection a daily log of the volumes or weight picked in each day by each worker, and that part of Section 40 of the *Regulations* which requires a farm labour contractor to pay wages to workers employed by the farm labour contractor, *"by deposit to the credit of the farm worker's account in a savings institution"*.

ARGUMENT AND ANALYSIS

9. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *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 made.*

10. The burden of demonstrating a breach of natural justice is on Mainland (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144?04)). The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).

11. Mainland submits four arguments in support of the appeal. I shall address each sequentially.

12. First, Mainland says the Determination is void *ab initio* because the Director failed to state the section of the *Act* under which the Determination was issued. Mainland argues that this failure represents a denial of the rights enshrined in Section 7 of the *Canadian Charter of Rights and Freedoms*.

13. In reply to this argument, the Director says the Determination identifies the provisions which Mainland was found to have contravened and the provision under which the administrative penalties were imposed.

14. In my view, this argument is technical in the extreme and is rejected. Mainland has not said how this alleged error should have the effect of rendering the Determination a nullity. Nor has Mainland indicated how the alleged error has operated in a way that is "unfair" to them. This argument represents nothing more than an attempt to place the Director in the kind of procedural straight jacket which the Tribunal has stated is inappropriate and inconsistent with the objects and purposes of the *Act* and the primary function of the Director.

15. As a general proposition, I do not accept that the Director is required to identify the section of the *Act* under which the Determination was issued. It is sufficient that the Director has identified the provisions of the *Act* and/or *Regulations* which were found to have been contravened and those which are relevant to the orders made. The identification of those provisions are enough to alert Mainland to what needs to be addressed in filing an appeal.

16. Even if the absence of any reference to the section of the *Act* under which the Determination was issued was an error made by the Director, such an error would, at most, constitute a technical defect and would not, applying Section 123 of the *Act*, invalidate the Determination or any other aspect of the proceeding before the Director.

17. It is unnecessary to consider the *Charter* argument, even if I had the authority to do so, as Section 7 of the *Canadian Charter of Rights and Freedoms* simply has no application to the circumstances of this case.

18. Second, Mainland says it was not, at the relevant time, a "farm labour contractor" as that term is defined in Section 1 of the *Act*. Mainland argues it fell outside the definition because it ". . . had control and supervision of its employees" at all material times. It is suggested that the definition applies only to a contractor who simply supplies labour, but is not involved in the direction or control of that labour. In support of this argument, Mainland has filed an affidavit from the president of Harry Bros Farms, saying the employees of Mainland were, at all material times, under the control and supervision of Mainland.

19. In reply, the Director submits that the facts adequately supported a conclusion that Mainland is a farm labour contractor under the *Act* and that any other conclusion is unreasonable.

20. This argument is rejected for the reasons which follow.

21. A "farm labour contractor" is defined in Section 1 of the *Act* as:

> *. . . 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.*

22. The issue, as it is raised in this appeal, has focussed on whether the employees of Mainland were under the control or direction of Mainland or of Harry Bros. Farms. That is a factual question which, if it were necessary to resolve in order to decide this part of the appeal, would need to be returned to the Director for further investigation and consideration. The argument by Mainland, however, ignores one element of the definition about which there is no dispute. The definition of "farm labour contractor" includes an employer whose employees work *for . . . another person, in connection with . . .*". In my view, the word *"for"* should be given an expansive meaning consistent with the nature of the relationship that is being described. An employee of a farm labour contractor is, at least, working *"for"* another person where the work that is being done by that employee benefits that other person in a material way. The Determination and material indicate the employees of Mainland were working on Harry Bros. Farms land, harvesting blueberries on that farm for Harry Bros. Farms. There is no doubt on those facts that Mainland's employees were working for Harry Bros. Farms at the relevant time. Those facts are sufficient to bring Mainland within the definition of "farm labour contractor" in the *Act*.

23. Accordingly, I do not need to address whether the employees were *"under the control or direction"* of Mainland or Harry Bros. Farms. Nor do I need to address whether the Tribunal would accept the new evidence, in the form of the affidavit of Gurmail Singh Harry, filed by Mainland in this appeal.

24. Third, Mainland argues the provision in the *Regulations* requiring direct deposit to a "savings institution" is vague, because "savings institution" is not defined in the *Act*, and is therefore incapable of supporting the "punitive action" taken by the Director. Mainland also says the provision is an affront to farm workers and violates their rights under Section 7 of the *Canadian Charter of Rights and Freedoms*.

25. The Director submits that while the term "savings institution" is not specifically defined in the *Act*, notes that there is a definition of "savings institution" in Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which defines that term for the purposes of the *Act*.

26. The Director is quite correct on this point and the argument alleging a "vagueness" in the requirement for direct deposit to an account in a savings institution is rejected.

27. As above, the *Charter* argument has no applicability or validity.

28. Finally, Mainland says the requirement to keep a record of volumes and weight picked by each worker for each day is, in their circumstance, an absurd requirement and the contravention of that requirement was not worthy of the administrative penalty imposed.

29. In reply, the Director says subsection 6(4) of the *Act* clearly sets out the information that is required to be kept by farm labour contractors in a daily for and to be available for inspection. Mainland did not keep a daily log that included "*the volume or weight picked in each day by each worker"*. The Director says the requirement does not distinguish between employees paid hourly and those paid by piece work.

30. Once again, Mainland's argument is entirely without merit. The requirements of subsection 6(4) are clear, mandatory and apply without distinguishing between employees paid by the hour or by piece work. Mainland does not deny it failed to meet all of those requirements. That is an unavoidable contravention of that provision. Any argument to the contrary is rejected, as is the *de minimis* argument.

31. In result, the appeal is dismissed.

ORDER

32. Pursuant to Section 115 of the *Act*, I order the Determination dated February 6, 2006 be confirmed in the amount of $1000.00.

David B. Stevenson
Member
Employment Standards Tribunal