Employment Standards TRIBUNAL

An appeal

- by -

Suncoast Health Corp. formally known as 0955323 B.C. Ltd.
("Suncoast")

- 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.: 2015A/182

DATE OF DECISION: March 23, 2016

DECISION

SUBMISSIONS

Ian Kennedy	counsel for Suncoast Health Corp. formally known as 0955323 B.C. Ltd.
Zack Anthony	on his own behalf
Michael Hug	on his own behalf
Lynn Ranger	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is a late appeal filed by legal counsel for Suncoast Health Corp. formally known as 0955323 B.C. Ltd. ("Suncoast") under section 112(1)(a) of the *Employment Standards Act* (the "*Act*") concerning a Determination issued against it on September 30, 2015. Suncoast says that the delegate erred in law in issuing the Determination because the two complainants awarded wages under the Determination were "farm workers" as defined in subsection 1(1) of the *Employment Standards Regulation* (the "*Regulation*"). Accordingly, so says Suncoast, they were excluded from the operation of certain provisions of the *Act* by reason of section 34.1 of the *Regulation* which provides as follows: "Part 4, except section 39, and Part 5 of the Act do not apply to farm workers." Part 4 of the *Act* sets out the hours of work and overtime provisions (section 39 prohibits "excessive" hours) and Part 5 of the *Act* addresses statutory holiday pay.

2. Counsel's memorandum of argument appended to Suncoast's Appeal Form refers to a second determination, issued against Suncoast's sole principal, Thomas Ross Brown ("Mr. Brown"), under subsection 96(1) of the *Act* on November 20, 2015. Subsection 96(1) states: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee." This determination has never been appealed to the Tribunal. Suncoast's counsel advised the Tribunal that this latter determination was not being appealed, presumably on the basis that if the Suncoast determination were cancelled, it would follow that the section 96 determination issued against Mr. Brown would similarly be of no legal force or effect.

3. On November 19, 2013, Zack Anthony ("Mr. Anthony") filed an unpaid wage complaint against Mr. Brown under section 74 of the *Act*. On November 22, 2013, Michael Hug ("Mr. Hug") filed an unpaid wage complaint in which he also named Mr. Brown as his employer. Although both complaints named Mr. Brown personally as the "employer", it seems clear from the record before me that Suncoast was the actual employer of the two complainants, although the delegate did not address this issue in her reasons (the delegate incorrectly stated in her written reasons accompanying the Determination that the complaints were filed against Suncoast).

4. Mr. Brown is recorded in the B.C. Corporate Registry as being the sole director and officer (president/secretary) of the present appellant, Suncoast. Suncoast operates a medical marijuana production facility in Sechelt, B.C. The subsection 112(5) record before me includes a "Designated Person Production Licence" issued by the federal government under section 40 of the *Marihuana Medical Access Regulations* authorizing Mr. Brown to possess 487 plants (indoors) and to store not more than 21,915 grams of dried marijuana on site. This licence was issued on August 12, 2013, and expired March 31, 2014. Mr. Anthony is

recorded as the "Holder" of the licence and Mr. Brown is described as the "Authorized Person" under the licence.

5. In his complaint, Mr. Anthony stated he worked for Mr. Brown from March 7 to September 20, 2013, and claimed nearly $93,000 in unpaid wages. Mr. Anthony stated that he worked as a "skilled labourer" and "construction site manager". Mr. Anthony appended a 1-page "Employment Agreement" to his complaint that identified "0955323 BC LTD" as the employer and this agreement obliges the employer to pay Mr. Anthony "$40.00/Hourly" for "services rendered by the employee". The B.C. Corporate records included in the subsection 112(5) record indicate that this numbered company was incorporated on November 16, 2012, and its name was formally changed to Suncoast Health Corp. on March 13, 2014. The B.C. Corporate Registry records also indicate that as of October 23, 2015, Suncoast had not filed an Annual Report since its last filing on November 16, 2013. A March 5, 2014, corporate search states: "This company is not in good standing".

6. Mr. Hug indicated in his complaint that he worked for Mr. Brown from August 1 to September 20, 2013, as a "labourer/contractor" and he sought approximately $8,500 in unpaid wages based on a $15 hourly wage rate.

7. These two complaints were the subject of an investigation conducted by a delegate of the Director of Employment Standards (the "delegate") that ultimately resulted in a Determination issued against Suncoast in the total amount $50,759.97. For the most part, Suncoast did not actively participate in the delegate's investigation. The delegate's written "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination on September 30, 2015, recount her various, mostly fruitless, efforts to engage Mr. Brown in the investigation. I shall provide further particulars regarding this latter matter later on in these reasons.

8. By way of the Determination, the delegate ordered Suncoast to pay Mr. Anthony the total sum of $38,827.72 on account of unpaid wages and section 88 interest. The delegate determined that Mr. Anthony was paid his regular wages for all hours worked but had a valid overtime pay claim ($32,943.76) and had not been paid some earned statutory holiday pay ($1,481.25) or any earned vacation pay ($2,217.00). The delegate awarded Mr. Hug $8,932.25 on account of unpaid wages and interest. This latter sum included regular wages ($3,028.00), overtime pay ($4,818.00), statutory holiday pay ($240.00) and vacation pay ($343.44). Further, and also by way of the Determination, the delegate levied six separate $500 monetary penalties against Suncoast (see section 98 of the *Act*) based on its contraventions of sections 17 (semimonthly payment of wages), 18 (payment of wages on termination of employment), 40 (overtime pay), 45 (statutory holiday pay) and 46 (premium pay for working on a statutory holiday) of the *Act*, and section 46 of the *Regulation* (failure to produce employment records as demanded). Thus, the total amount of the Determination is $50,759.97.

9. The Determination is five pages in length and pages 4 and 5 include a notice to Mr. Brown regarding his possible personal liability under section 96 of the *Act* and some excerpts from the *Act*. There is a text box on the third page of the Determination headed "Appeal Information" that sets out information regarding the appeal process and, most importantly for present purposes, the deadline for filing an appeal: "Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on November 9, 2015" (**boldface** in original text). This deadline was presumably calculated in accordance with the "deemed service" provisions contained in subsections 122(1) and (2) of the *Act*.

10. This appeal was filed on December 24, 2015, some 6 ½ weeks after the appeal period expired. Subsection 109(1)(b) of the *Act* gives the Tribunal the discretionary authority to "extend the time period for requesting an appeal … even though the period has expired". Accordingly, Suncoast seeks an extension of the appeal period under this provision. I now turn to this application.

SUNCOAST'S APPLICATION TO EXTEND THE APPEAL PERIOD

11. The Determination was sent to Suncoast, by registered mail, on September 30, 2015, to its business address in Sechelt as well as to its registered and records office (the Determination was sent to both the "mailing address" and "delivery address" as recorded in the B.C. Corporate Registry). In addition, the Determination was also sent, again by registered mail, to Mr. Brown c/o each of the Suncoast "mailing" and "delivery" addresses.

12. The record before me includes internal Employment Standards Branch ("ESB") registered mail tracking records. Canada Post returned to the ESB the envelope addressed to Suncoast's business address with the stamp "No such address" – this despite the fact that the address in question was recorded on Mr. Anthony's "Employment Agreement" and on the marijuana production licence as the "production site". The two envelopes addressed to Suncoast's mailing and delivery addresses were returned stamped as "moved/unknown" and "refused", respectively. The two envelopes addressed to Mr. Brown were returned also stamped as "moved/unknown" and "refused".

The Delegate's Investigation

13. The record is replete with various efforts by the ESB to engage Suncoast and Mr. Brown in the investigative process and it seems clear that Mr. Brown was simply not the remotest bit interested in meaningfully participating in the investigation. Mr. Brown repeatedly refused or neglected to respond to the ESB's many telephone calls, e-mails and formal correspondence. In a telephone conversation with an ESB officer on December 9, 2014, Mr. Brown indicated that he was not picking up his mail at his mail box and adamantly refused to provide another mailing address.

14. The various ESB communications to which Mr. Brown did not respond include an e-mail and a letter, both dated April 3, 2014, enclosing a demand for employment records and seeking Suncoast's response to the two unpaid wage complaints; an e-mail dated October 2, 2014, providing Mr. Brown with Mr. Anthony's written submission and reiterating the demand for employment records; an e-mail dated November 17, 2014, yet again reiterating the demand for records, enclosing the complainants' records regarding their hours of work, and inviting Mr. Brown's response; another e-mail to like effect sent on November 26, 2014, and, yet again, on November 28, 2014; an e-mail sent December 24, 2014, seeking particulars from Mr. Brown regarding his vague assertions, contained in one-paragraph December 23, 2014, response to the delegate, regarding his allegations of "forgery" on Mr. Anthony's part and also, once more, requesting employment records.

15. Other than a cursory response sent by e-mail to the delegate on December 23, 2014, followed by another short e-mail on December 27, 2014, Mr. Brown simply did not respond in any meaningful way to the ESB's several communications to him. The most substantive response from Mr. Brown was his December 27, 2014, e-mail to the delegate in which he stated, once again, that the employment agreement between Suncoast and Mr. Anthony was a "forgery" and stating that he paid Mr. Hug "in cash". While Mr. Brown stated he had relevant text messages and cheque stubs, he did not produce these documents.

16. On February 17, 2015, the delegate sent yet another e-mail to Mr. Brown seeking specific information by no later than March 31, 2015, and also requesting a mailing address. Mr. Brown replied on February 27, 2015, asking for an "extension" and stating that the claims were "fraudulent" and that he intended to retain legal counsel (which he apparently never did until faced with the Director's execution proceedings). On May 26, 2015, the delegate sent what appears to have been her final communication to Suncoast prior to issuing the Determination – the delegate enclosed some further relevant documents and asked for Mr. Brown's response by no later than June 2, 2015. The delegate also asked Mr. Brown to provide a mailing address for purposes

of receiving registered mail. Mr. Brown did not reply to the delegate and, on September 30, 2015, the delegate issued the Determination and her accompanying reasons.

17. The record also includes various internal ESB e-mail records that indicate all of the e-mails sent to Mr. Brown were successfully delivered.

Analysis of the "Niemisto" Criteria

18. A subsection 109(1)(b) application to extend an appeal period is evaluated in light of the criteria first set out in *Niemisto*, BC EST # D099/96. The relevant considerations include whether: i) there is a reasonable and credible explanation for failing to appeal within the statutory time limit; ii) there has been a genuine and on-going *bona fide* intention to appeal; iii) the respondent parties were made aware of this intention; iv) one or more respondent parties will be unduly prejudiced by extending the appeal period; and v) there is a strong *prima facie* case in favour of the appellant.

19. The delay involved in this case, about 6 ½ weeks, is significant particularly in light of the fact that one of the purposes of the *Act* is to ensure "fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (subsection 2(d)). The complaints were originally filed in November 2013 and the delegate's investigation was repeatedly delayed as a result of Suncoast and Mr. Brown refusing to respond to the many requests for information and documentation. It seems to me that Suncoast's strategy all along has been to avoid and delay dealing with the complaints in any meaningful way.

20. Counsel for Suncoast says that the firm and Mr. Brown first learned about the Determination "on Thursday, December 10, 2015, when they were delivered to him by a bailiff". While this might be technically correct, as the above factual history clearly demonstrates, the *only* reason why Suncoast and Mr. Brown did not receive the Determination at an earlier point in time is because the registered mail envelopes containing the Determination were "refused". Further, Mr. Brown affirmatively failed to provide an alternate mailing address for Suncoast and himself despite being specifically asked to do so on several occasions. In my view, the only reasonable inference to draw from the record before me is that Suncoast and Mr. Brown chose to follow a path of deliberate non-cooperation with the delegate's investigation and were only moved to act when faced with immediate enforcement proceedings. This appeal was then filed about 2 weeks later. I am not satisfied that Suncoast has provided a reasonable explanation for its failure to file a timely appeal.

21. The Director's enforcement actions have apparently been successful since, according to Suncoast's counsel, "the Appellant paid to the bailiff the full amount required by Determination, as well as the bailiff's fees" and that "[t]he Director has agreed to hold that payment pending the outcome of this appeal". In light of these facts, I suppose it could be said that some further delay would not unduly prejudice the complainants and the delegate does concede "extending the appeal deadline poses no apparent harm to the respondent's [*sic*] case".

22. As noted at the outset of these reasons, Suncoast maintains that the complainants' unpaid wage awards on account of overtime pay and statutory holiday pay (which comprise a significant portion of the total unpaid wage award) cannot stand since both complainants were "farm workers" and thus excluded from Part 4 (except section 39) and Part 5 of the *Act*. However, it should also be noted that even if Suncoast were to prevail with respect to the "farm worker" argument, both complainants would still be entitled to wages (at their regular wage rate) for all "overtime" hours worked and for any hours worked on a statutory holiday since employees are entitled to be paid for all hours worked. "[A]n employer must pay to an employee all wages earned by the employee in a pay period" (section 17 of the *Act*) even if that employee is not entitled to any premium pay for overtime hours worked – see, *e.g.*, *Higginson*, BC EST # RD045/11.

23. A "farm worker" is defined in subsection 1(1) of the *Regulation* as follows:

> **"farm worker"** means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of
>
> (a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,
>
> (b) clearing, draining, irrigating or cultivating land,
>
> (c) operating or using farm machinery, equipment or materials for the purposes of paragraph (a) or (b), or
>
> (d) direct selling of a product referred to in paragraph (a) if the sales are done at the operation and are only done during the normal harvest cycle for that product,
>
> but does not include any of the following:
>
> (e) a person employed to process the products of a farming, ranching, orchard or agricultural operation other than to do the initial washing, cleaning, sorting, grading or packing of
>
> (i) an unprocessed product of the operation during the normal harvest cycle for that product, or
>
> (ii) during the same harvest cycle referred to in subparagraph (i), the same or a similar unprocessed product purchased by the operation from another farming, ranching, orchard or agricultural operation;
>
> (f) a landscape gardener or a person employed in a retail nursery;
>
> (g) a person employed in aquaculture...

24. Suncoast's counsel submits "the Appellant is exclusively in the business of producing medical marihuana, which it is properly licenced to produce" and that "the Complainants [were hired] to cultivate marihuana, and that is the work they performed".

25. The "farm worker" argument was never presented to the delegate. In an e-mail sent to the delegate on December 23, 2014, Mr. Brown stated that Mr. Anthony's employment agreement was a "forgery" and that both Messrs. Hug and Anthony were retained under "verbal" agreements; he also stated that Mr. Hug was paid all of his wages "in cash". In a subsequent e-mail to the delegate sent December 27, 2014, Mr. Brown reiterated his position that Mr. Anthony's employment agreement was a "forgery" and he accused Mr. Anthony of theft (there is nothing in the record corroborating this serious, and potentially defamatory, assertion). In Mr. Brown's final e-mail to the delegate, sent on February 27, 2015, he once again stated his position that the claims were "fraudulent" but also indicated that he had recently spoken with legal counsel. Curiously, and despite having apparently obtained legal advice, there is no mention of the "farm worker" exemption argument.

26. Of course, the "farm worker" argument could have, and should have, been presented to the delegate during her investigation. But it was not. Thus, this argument stands as an entirely new one raised for the very first time on appeal. In general, the Tribunal will not accept new arguments on appeal that should have been presented to the delegate – the seminal case in this regard is *Tri-West Tractor Ltd.*, BC EST # D268/96 (at page 3):

> But I also dismiss the appeal as it relates to cause on another ground. This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it.

> An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. It rings hollow to cast the blame for the failure of Tri-West to respond to the inquiries of the delegate onto its legal counsel. Legal counsel is the agent for Tri-West. Its failure is Tri-West's failure.

27. The so-called *Tri-West/Kaiser Stables* principle equally applies where the appellant, as is the case here, only participated in the delegate's investigation in very limited way (see *Trev.com InterNETional Mfg.*, BC EST # D550/97); see also *Ocean City Realty Ltd.*, BC EST # D277/03 – "I note that while a Delegate may well have come to a different conclusion if all parties fully participate in an investigation, that different conclusion does not demonstrate error on the part of the Delegate" (page 5). The Tribunal has repeatedly endorsed this approach to arguments raised for the very first time on appeal including in recent decisions such as: *Mickey Transport Ltd.*, BC EST # D124/14; *Mauryabistro Ltd.*, BC EST # D118/14 (reconsideration refused: BC EST # RD023/15); *Elite Furniture Ltd.*, BC EST # RD020/16; and *Fraser Valley Community College Inc.*, BC EST # D027/16.

28. Mr. Hug opposes Suncoast's application to extend the appeal period citing Mr. Brown's "inaccessibility by mail". Similarly, Mr. Anthony says that the appeal period should not be extended and that this matter be concluded "without further delay". As for the "farm worker" issue, Mr. Hug maintains that he was "primarily a labourer responsible for facilities construction, and not primarily a farm worker". Mr. Hug's submission details the various "construction"-type duties and tasks he undertook during his period of employment. Mr. Anthony also maintains that he was employed in a "construction" capacity – "Thomas Brown solely hired me for my previous construction experience and to fill the role of an In House Construction-based position at the Sechelt BC facility".

29. Mr. Brown's position, as set out in the delegate's reasons, also appears to corroborate the complainants' respective positions that they were "construction workers". For example, at page R8 of her reasons, the delegate notes: "[Mr. Brown] states he did not keep track of all hours worked by the Complainants but they only performed basic jobs such as letting the trades on the site, unloading tools and assisting with the construction of the building."

30. However, there are aspects of the delegate's reasons that appear to suggest Mr. Hug had at least some "farm worker" type duties. For example, at page R11, the delegate notes that Mr. Hug stated he was initially hired as a "labourer" "to pot and transplant marijuana plants" and that:

> Later, his job duties included assisting the electrical contractors, laying out parts for each room and performing daily clean up duties while the site was under construction. Once the warehouse construction was complete he assisted with the interior design and construction of 21 growing rooms. This included poly wrapping the walls, installing plug covers, mounting a multitude of lights and fans, installing doors and taping holes to eliminate any outside light. Once the inside construction phase was completed his duties returned to caring for the plants which consisted of watering every other day, transplanting plants, mixing nutrients and general daily maintenance of the plants.

31. Thus, it would appear there may be some merit to Suncoast's argument that, with respect to Mr. Hug, while he worked as a construction labourer, he also – at least for a portion of his tenure – did work that could be characterized as "farm" work within the subsection 1(1) definition, assuming that the cultivation of marijuana is an "agricultural" activity.

32. The delegate's reasons also indicate that Mr. Anthony worked as a construction labourer but had additional duties related to marijuana production (page R15):

> Mr. Anthony states he was hired on March 7, 2013 as a skilled labourer/construction site manager... His job duties included: opening and closing the construction site each day, assisting the construction trades with related activities and purchasing supplies from the local hardware store. He was also required to maintain the marijuana crop which included: picking up plant supplies, watering, fertilizing, spraying insect repellent, picking leaves, trimming buds, rotating, transplant, caging and potting plants. He also performed hourly checks of the light, temperature, humidity, CO^2 levels in all 19 rooms and the grow site. In addition he provided overnight security, which required him to monitor the site every two hours and called Mr. Brown daily to update him on the progress and status of the construction site and the plants.

33. With respect to whether or not Suncoast's operations constitute an "agricultural operation", Suncoast's counsel relies on a decision from the Ontario Labour Relations Board, *United Food and Commercial Workers Canada v MedReleaf Corp.*, 2015 CanLII 85534, and submits that the production of medical marijuana clearly should be so characterized. *MedReleaf* concerned a union application for certification under Ontario's *Labour Relations Act* and the employer, as is the case here, operated a medical marijuana production facility. The Board dismissed the union's certification application on the basis that the Ontario *Agricultural Employees Protection Act* ("*AEPA*"; see *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3) – not the *Labour Relations Act* ("*LRA*") – was the governing labour relations statute. There is no British Columbia equivalent of the latter statute and, in British Columbia, farm workers fall under the *Labour Relations Code*.

34. MedReleaf's argument regarding the nature of its operations was as follows (para. 24): "Although the conditions its employees work in may more resemble a factory or industrial setting than what one may envisage on a bucolic family farm, that does not change the fundamental nature of what MedReleaf does – agriculture." The union argued that the employer's facility produced "a product akin to a pharmaceutical" and therefore MedReleaf was not engaged in "agriculture" as defined in the *AEPA*. The Board concluded that marijuana was an "agricultural commodity" in the same vein as tobacco or grapes grown to produce wine and that, unlike pharmaceuticals, it was not manufactured but, rather, was "a plant that is grown and harvested – albeit inside in a building with cutting edge technology" (para. 37). The Board ruled as follows (para. 46): "I conclude that the employees of MedReleaf are 'in agriculture' and are excluded from the *LRA*, and this application and the other related applications must be dismissed – without prejudice to the Union filing whatever proceeding it may wish before the Tribunal under the *AEPA*."

35. The union applied for reconsideration of the *MedReleaf* decision and in a decision issued on January 21, 2016, the Board refused the application (see *United Food and Commercial Workers Canada v. MedReleaf Corp.*, 2016 CanLII 2641). One point that was not addressed in the *MedReleaf* decision was whether or not the employer's operations were governed by *federal*, rather than provincial, labour law. The union was certainly alive to this issue since it concurrently filed a parallel application for certification with the Canada Industrial Relations Board under the *Canada Labour Code*.

36. Suncoast operates pursuant to a licence issued under the federal government's *Marihuana for Medical Purposes Regulations* issued under the *Controlled Drugs and Substances Act* and, but for this licence, could not lawfully operate a medical marijuana production facility (leaving aside the evolving law concerning *Charter* exemptions). The *Controlled Drugs and Substances Act* is a criminal law statute and the federal government has exclusive constitutional jurisdiction over criminal law (see *Constitution Act*, 1867, subsection 91(27); see also, *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571; *R. v. Clay*, [2003] 3 S.C.R. 735; and *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134). While construction work typically falls under provincial jurisdiction, it may be that employment disputes concerning employees working in a federally-licensed marijuana production facility fall under federal employment legislation as is the case with nuclear power plant

employees (see *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327) or employees working in federally chartered banks (see, *e.g.*, *National Bank of Canada v. Retail Clerks' International Union et al.*, [1984] 1 S.C.R. 269).

37. While provincial jurisdiction over labour and employment relations is the presumptive norm, employees may fall under federal jurisdiction if they are employed in a work, undertaking, or business within the federal government's legislative authority or if the employees' duties constitute an integral part of a federally-regulated undertaking (this is known as the federal government's "derivative jurisdiction"). In *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, [2012] 2 S.C.R. 3, the Supreme Court of Canada observed (at paras. 48 – 49): "… federal labour regulation may be justified when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities … [or] … federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation".

38. As I noted above, Suncoast was only permitted to operate its business by virtue of a licence issued by the federal government under its criminal law jurisdiction. To the extent that the work undertaken by the two complainants can be discretely compartmentalized as either "construction" or in relation to the cultivation of medical marijuana, the former duties would presumptively fall under provincial jurisdiction while the latter duties might fall under federal jurisdiction. I express no firm view about this issue.

39. Suncoast's legal counsel also relies on the Tribunal's decision in *Falcon Farms Ltd.*, BC EST # D069/02, for two propositions: "First, it defines 'farming' to further clarify the 'farm worker' definition under the *Regulations*. … Second, *Falcon Farms* confirms that it is an error in law for the Director not to recognize employees as farm workers where this is relevant to the outcome of the Determination." In *Falcon Farms*, the employer (that *did* actively participate in the investigation) operated a falcon breeding/sales operation and it unsuccessfully argued during the investigation that the complainant was a "farm worker". On appeal, the Tribunal cancelled the determination, holding that the complainant was a "farm worker" (at page 6):

> "Farming" is the "use [of land] for growing crops, rearing animals, etc." There can be no dispute that the Employer's land and buildings are used for rearing falcons. I understand that other parcels of land are used for berry crops. The operation in question is falcons. Falcons are animals. Falcons are, of course, also found in the wild, in nature.
>
> … Farming is a developing business, new crops or animals are added to the "menu." Recent years have seen ostrich farms and the like. Wild animals may be domesticated, i.e., being converted to domestic use. The falcons bred and raised on Falcons Farms are bred and raised for use – sport – and profit – namely sale. The "core operation" of the Employer is the breeding and raising of falcons. The fact they are bred and raised for sport does not preclude the Employer from being a farm. I do not see any substantial difference between a mink farm or a falcon farm or, for that matter, an ostrich farm. As well, I do not see any substantial difference between an operation that breeds and raises horses for sport and one that breeds and raises falcons. In short, in my view, from the plain and ordinary meaning of the language in the *Regulation*, these would be considered farming. On the facts of this case, I accept that the Employer operates a farm, [and] that [the complainant] was a "farm worker"...

40. Following *Falcon Farms*, Suncoast's medical marijuana cultivation operation might be characterized as a "farm" with medical marijuana simply being a "new crop" that has been added to the "menu". With respect to what constitutes an "agricultural operation", see also: *Peace Country Livestock Auction Ltd.*, BC EST # D451/00, reconsideration refused: BC EST # RD147/01 and *Super Farm Contractors Ltd.*, BC EST # D456/01.

41. Without necessarily discounting the complainants' submissions that their duties were primarily in relation to construction, it must also be recognized that the delegate's reasons clearly indicate that, at least to a degree, both gentlemen were involved in Suncoast's "core" activity, namely, the production of medical marijuana.

FINDINGS

42. Returning to the *Niemisto* criteria, while I am far from satisfied that Suncoast has provided a reasonable explanation for its failure to file a timely appeal, I am satisfied that there is some presumptive merit to its appeal. However, unlike the appellant in *Falcon Farms*, Suncoast did not present the arguments now raised on appeal to the delegate. Indeed, for the most part, Suncoast simply refused to meaningfully participate in the delegate's investigation. The argument presently advanced with respect to the "farm worker" issue was never placed before the delegate and the *Tri-West/Kaiser Stables* line of authorities is a very obvious barrier to Suncoast now raising it on appeal.

43. On the other side of the ledger, I do not believe that the Tribunal should confirm a decision that may well have been, at least in part, outside the delegate's statutory authority to issue. There is also the federal-provincial jurisdiction issue to consider. The Determination was issued following an investigation rather than an oral complaint hearing, and the delegate never turned her mind to the possible application of section 34.1 of the *Regulation* or to the possible federal-provincial jurisdictional question. I say this without any criticism of the delegate but nevertheless, these issues were raised by the facts before her and she did not address them. The delegate, at page R7 of her reasons, states that Suncoast built and now operates a medical marijuana production facility. In the very next sentence, the delegate simply declares "The complaints fall within the jurisdiction of the Act" but the delegate did not investigate (or provide any written analysis regarding) the jurisdictional issues.

44. Suncoast is not presently in good standing with the B.C. Corporate Registrar, and that is a further reason to ensure that this matter is not unduly delayed. However, the full amount of the Determination has now been attached through the Director's enforcement proceedings and presently stands in the Director's interest-bearing trust account. Accordingly, other than further delay (which will be partially offset by additional interest accrual), the complainants' financial interests are fully secured.

45. Suncoast's failure to meaningfully participate in the investigation – and its wholly unconvincing explanation for its failure to file a timely appeal – would ordinarily militate against an order extending the appeal period. However, Suncoast has presented a strong *prima facie* case that the Determination is not legally tenable. Further, Suncoast's marijuana production operations (as distinct from the initial construction of the facility) may not even fall under provincial employment standards legislation, in which case the complainants' unpaid wage claims regarding work related to marijuana production must be addressed under the *Canada Labour Code*. Accordingly, *and only because of the very exceptional circumstances of this case*, I am prepared to extend the appeal period to December 24, 2015. Thus this appeal is now properly before the Tribunal.

46. As previously noted, the delegate opposes Suncoast's application to extend the appeal period. However, the delegate also says that if the appeal period were extended, the complaints should be referred back to the Director as further factfinding may be required, particularly in regard to the actual hours worked by the complainants in "farm" versus "construction" duties. I do not think it appropriate to simply strike, as Suncoast's counsel suggests, the overtime pay and statutory holiday pay orders and issue a final order varying the Determination accordingly. Even if the complainants were "farm workers", they are still entitled to be paid at their regular wage rates for all hours worked and thus while the overtime pay and statutory holiday pay awards may be reduced, they may not necessarily be cancelled altogether. In light of the above considerations, I am referring these two complaints back to the Director for further investigation.

ORDERS

47. Suncoast's subsection 109(1)(b) application to extend the appeal period in this matter is granted. The appeal period is extended to December 24, 2015.

48. Pursuant to subsection 115(1)(b) of the *Act*, these two complaints are referred back to the Director for further investigation.

49. The Director shall provide the parties with a reasonable opportunity to be heard and will then prepare a report to be delivered to the Tribunal by no later than 120 days from the date of this decision. The Tribunal will then afford the parties an opportunity to make submissions with respect to that report and will then issue a final decision in this appeal.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal