

An appeal

- by -

MJ Labour Contractor 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: John Savage

FILE No.: 2006A/45

DATE OF DECISION: May 30, 2006

DECISION

SUBMISSIONS

Kulvir Bains, for MJ Labour Contractor Ltd.

Ravi Sandhu, for the Director of Employment Standards

OVERVIEW

1. This is an appeal from a Determination dated February 20, 2006 by the Director that found that MJ Labour Contractor Ltd. (“MJ Labour”) had breached provisions of the *Employment Standards Act* RSBC 1996, c.113 (the “Act”) and the *Employment Standards Regulation*, BC Reg. 396/95 (the “Regulation”).
2. MJ Labour is a licensed farm labour contractor as defined in the Act. On June 23, 2005 the Agricultural Compliance Team conducted a site visit to Arjuna Farms located in Abbotsford, British Columbia. MJ Labour was found to be providing contract labour to Arjuna farms at the time of the visit. All employees were interviewed. On September 12, 2005 an Employment Standards Officer issued a Demand for Records requiring the delivery of records on or before September 26, 2005.
3. The Director found breaches of Sections 17 and 28 of the Act and section 40.2 of the Regulation. Subsection 17(1) of the Act requires the payment of wages at least semi monthly and within eight days of the end of the pay period. Section 28 of the Act requires that the Employer keep certain payroll records for each employee. Section 40 of the Regulation requires that employees of a farm labour contractor be paid by way of direct deposit. Administrative penalties totaling \$3,500.00 were imposed.
4. MJ Labour includes with his appeal a letter dated March 26, 2006 from the owner of the farm at which the work was being done, a written explanation, and copies of T4 slips. MJ Labour appeals the determination of the Director on the basis that evidence has become available that was not available at the time the Determination was being made.

ISSUE

5. The only issue in the appeal is whether evidence has become available that was not available at the time the Determination was being made.

LEGISLATION

6. In this case the Director found there to be breaches of sections 17 and 28 of the Act. Those provisions are as follows:
 17. (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.
 - (2) Subsection (1) does not apply to
 - (a) overtime wages credited to an employee's time bank, or
 - (b) vacation pay.

1995, c. 38, s. 17; 2002, c. 42, s. 5.

28. (1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
- (2) Payroll records must
- (a) be in English,
 - (b) be kept at the employer's principal place of business in British Columbia, and
 - (c) be retained by the employer for 2 years after the employment terminates.

1995, c. 38, s. 28; 1998, c. 36, s. 3, part; 2002, c. 42, s. 9.

7. The Director also found there to be a breach of section 40.2(2) of the *Regulation*:
- 40.2 (1) In respect of the payment of wages to farm workers, farm labour contractors are excluded from section 20 of the Act.
- (2) A farm labour contractor must pay all wages to farm workers employed by the farm labour contractor
- (a) in Canadian dollars, and
 - (b) by deposit to the credit of the farm worker's account in a savings institution.
- B.C. Reg. 257/2004.
8. The basis of the appeal is that new evidence has become available. The appeal provisions to this Tribunal provide as follows in s. 112 (1) of the *Act*:
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.
9. The only ground of appeal identified is section 112(1)(c).

DISCUSSION AND ANALYSIS

10. As indicated in the Determination, MJ Labour was aware of the requirements of the *Act* and *Regulation* having been through the farm labour contracting process on October 30, 2003. As part of that process MJ Labour was required to pass a written examination to satisfy the Director of their knowledge of the *Act* and *Regulation*.
11. The Determination notes that the interview checklist for the examination notes that all employees must be paid all wages earned at least semi-monthly and within eight days of the end of the pay period, that all employees must be included in payroll records, and that wages must be paid by direct deposit. The Determination appealed found there to be breaches of these three fundamental requirements.
12. In the Determination the Delegate noted that MJ Labour took issue with whether the individuals interviewed were employees of MJ Labour and that “they may have been working with another contractor”. The Delegate found there to be no merit to this position because “all employees who were missing from the payroll were interviewed during the site visit and clearly indicated that their employer was MJ”. In addition, the Delegate found that there were no other contractors providing labour to Arjuna Farms on the day of the site visit.
13. The submission of MJ Labour focused on whether there was a breach of section 28 of the *Act*. It attached a letter from Prid Sidhu, a partner of Arjuna Farms. The letter is as follows:

March 26, 2006

To: Employment Standards Branch

This letter is to confirm that the list of employees that was provided by MJ Labour Contractor to the Agricultural Compliance Team on June 23, 2005 is to be correct.

The employee names of Flori, Seeta K., Kartar K. Sandhu, Jasvinder K. Maan and Jagir K. Dhaliwal were not at our farm on June 23, 2005.

Please call.....if you have any questions or concerns regarding this matter.

Yours truly,
14. In response to this correspondence the Delegate notes that the Agricultural Compliance Team interviewed the named people. Attached and forming part of the record are interview sheets dated June 23, 2005 with details concerning the interviews. The interview sheets are a typewritten form and the particular sheets attached are completed in hand writing, recording names, the name of the individual on site representing the employer and the corporate name of the Farm Labour Contractor, the name of the interviewer, and particulars about wages.
15. While the letter says that the list of employees provided by MJ Labour ten months earlier was correct, it also says that the persons listed were “not at our farm on June 23, 2005”. Thus, the Delegate notes, the evidence that is proposed to be introduced conflicts directly with the contemporaneous interview evidence recorded in the interview sheets. It also conflicts with the position of MJ Labour before the Delegate that “they may have been working with another contractor”.

16. Section 112(1)(c) of the *Act* provides a right of appeal where a party has “evidence has become available that was not available at the time the determination was being made”. In deciding whether the Tribunal should receive new evidence on appeal the Tribunal has been guided by the test applied in civil courts for admitting fresh evidence on appeal: *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03.
17. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue.
18. The evidence that is proposed to be introduced contradicts contemporaneous statements made by persons on the date when the interviews were taken on June 23, 2005. It is inconsistent with the observations of the Agricultural Compliance Team on that date. The letter from the farm owner is dated nearly 10 months after the observed events. The evidence sits uncomfortably with the position taken by MJ Labour during the investigation, namely, that the persons interviewed may have been working for another Farm Labour Contractor.
19. In these circumstances, in my opinion, the evidence proposed to be introduced fails to meet the test for admitting new evidence on appeal, as (1) it is not reasonably capable of belief, (2) it is not of high probative value, and (3) it could, with ordinary diligence, have been presented to the Director during the course of the investigation.

SUMMARY

20. The evidence that is proposed to be introduced does not meet the test for introducing new evidence on appeal pursuant to section 112(1)(c) of the *Act*.

ORDER

21. The appeal is dismissed and pursuant to Section 115 of the *Act*, the Determination of the Delegate is confirmed.

John Savage
Member
Employment Standards Tribunal