

An appeal

- by -

Maan Farms Ltd.
("Employer")

- 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: Yuki Matsuno

FILE No.: 2010A/61

DATE OF DECISION: July 20, 2010

DECISION

SUBMISSIONS

Devinder Kaur Maan

on behalf of Maan Farms Ltd.

Ravi Sandhu

on behalf of the Director of Employment Standards

OVERVIEW AND BACKGROUND

1. Maan Farms Ltd. (the “Employer”) appeals a Determination of the Director of Employment Standards issued March 26, 2010 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Determination was issued by a delegate of the Director of Employment Standards (the “Delegate”) after worksite visits conducted in June 2009 at the Employer’s worksite and a routine compliance audit that took place in November 2009.
2. The Determination outlines that during the worksite visits, held on June 18 and 24, 2009, several people who were hand harvesting strawberries were interviewed by the Employment Standards Branch’s Agriculture Compliance Team (the “Team”). These people told the Team that the Employer employed them and paid their wages. On November 23, 2009, a delegate of the Director issued a Demand for Records to the Employer, pursuant to section 85(1)(f) of the *Act*. The Employer produced the required documents, including payroll records and daily logs. When the worksite visit records were cross referenced with the records provided by the Employer, it was determined that not all of the employees interviewed during the worksite visit were documented in the payroll records as having done work on the two days on which the worksite visit was carried out. Further, some employees interviewed did not appear in the Employer’s payroll records at all. The Employer was subsequently sent a letter providing an opportunity to respond to this information, and the Employer sent in a response along with the payroll records of two additional employees. The Employer responded that some of the people interviewed were employees who provided the Team with false names; others were employees but were participating in U-Pick at the farm or were friends or family members of the employees.
3. In the Determination, the Delegate points out that under section 28 of the *Act*, an employer is required to keep records for each employee consisting of certain information, including name, occupation, address, and wage rate. Employers are also required under the same section to record the hours worked by the employee on each day. The Delegate examined the definition of “employee” in the *Act* to conclude that even if the Employer’s explanation were correct (that some of the interviewed people were doing U-Pick or were friends or family of employees), those people are still considered employees under the *Act* because they were performing work that is normally performed by an employee. The Delegate also found that if some of the employees had given false names, as suggested by the Employer, the payroll records should have shown extra employees working on the two days, which was not the case. The Delegate concluded that the Employer had failed to maintain proper payroll records for each employee in accordance with the *Act* because (a) some employees who were working on the days of the site visits were not documented as having worked on those days in the payroll records and (b) some employees working on the days of the site visits were not mentioned in the payroll records at all. The Delegate found the date of contravention to be June 24, 2009, and imposed an administrative penalty of \$2,500.00 on the Employer pursuant to section 29 (1) of the *Employment Standards Regulation* (the “Regulation”).

4. The Employer appeals the Determination on the ground that the Director erred in law in making the Determination. I am able to decide this appeal on the basis of the written materials submitted before me, namely: the Employer's appeal form and submissions; the submissions of the Director; and the Record forwarded by the Director under section 112(5) of the *Act*.

ISSUES

5. Did the Director err in law in making the Determination?

ARGUMENT AND ANALYSIS

6. The onus on showing that the Director, as represented by the Delegate, erred in law rests with the appellant. I will refer only to those submissions of the parties that are relevant to the issue to be decided in this appeal.
7. The leading case in Tribunal jurisprudence with respect to error of law is *Britco Structures Ltd.*, BC EST # D260/03, in which the Tribunal adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.C.J. No. 2275 (B.C.C.A.):
- a) a misinterpretation or misapplication of a section of the *Act*;
 - b) a misapplication of an applicable principle of general law;
 - c) acting without any evidence;
 - d) acting on a view of the facts which could not reasonably be entertained; and
 - e) adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05).
8. The *Act* defines "employee" as follows:
- "employee" includes
- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
 - (c) a person being trained by an employer for the employer's business,
 - (d) a person on leave from an employer, and
 - (e) a person who has a right of recall;
9. Section 28(1) of the *Act* outlines the requirement for employers to maintain certain records:
- 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.

10. The Employer asserts that the Director erred in making certain factual conclusions. Errors of fact in a determination are not open to appeal unless they are found to serve as the basis for an error of law – that is, the appellant must show that the delegate acted without any evidence or acted on a view of the facts that could not reasonably be entertained. In this case, with regard to the twelve employees whom the Delegate found to appear in the payroll records but not as working on the days of the worksite visits, the Employer says that to the contrary, the payroll records indicate that these employees in fact worked on those days. The Employer says that the Delegate misinterpreted the payroll records because the first column of the payroll document indicates the last day of the work week, not the first day. The Delegate agrees with the Employer's argument.
11. The Employer also argues that the Delegate was wrong to find that the seven people who were interviewed during the worksite visits but do not appear in the payroll records were nevertheless employees of the Employer for whom the Employer should have kept employee records. With regard to four of these people, the Employer's belief is that they are in fact employees who are shown in the payroll records to have worked that day but chose to give the Team false names during the worksite visits. The Employer says that it is common for farm labourers to give false names during worksite visits. The Employer says the remaining three workers who do not appear on the payroll records were family or friends of employees or were at the farm for U-Pick berries. The Employer says that as a small farmer, it is difficult to monitor berry pickers all the time – the only time the Employer interacts with their workers is when they begin work in the morning and when the Employer collects berries from them. The Employer argues that these three workers should not be considered employees as they were working without the Employer's knowledge. (I note that the Employer also brought these arguments to the attention of the Delegate before the Determination was issued). The Delegate says in response that the workers answered questions concisely and clearly in the interview and there was no indication that anyone was not answering honestly. The Delegate also states that the workers who the Employer says may have been friends or family of the employees or U-Pickers would nevertheless be considered to be employees as defined in the *Act*.
12. My view is that in spite of the misinterpretation of the payroll records, it cannot be said that the Delegate made an error of law in making the Determination. In making the Determination, the Delegate had evidence – the information gathered during the Team interviews during the worksite visits and the payroll records – that seven people who were working during the worksite visits were not recorded in the payroll records produced for those days. The Delegate applied the definition of "employee" as found in the *Act* and made a finding that these people were employees of the Employer because they stated they were receiving wages

from the Employer and were performing work normally performed by an employee. The Employer's statements about the difficulty of monitoring berry pickers does not contradict the Delegate's findings in any way – it remains the Employer's duty to manage their workers and the worksite in order to conform with the minimum standards outlined in the *Act*. Further, the Employer's statements that four of their employees may have misidentified themselves to the Team and that the other three people were either friends or family of employees or U-Pickers remain in the realm of speculation and do not amount to evidence to show that the Delegate erred. I find that the Delegate acted with evidence and on a view of the facts that could be reasonably entertained. After finding that the Employer was in breach of section 28 of the *Act*, the Delegate properly applied section 29 of the *Regulation* which calls for non-discretionary penalties for contraventions of the *Act*. In this case, because it was the Employer's second contravention within three years, the amount of the penalty was determined to be \$2,500.00.

13. I conclude that the Director did not err in law in making the Determination.

DISPOSITION OF THE APPEAL

14. The appeal is dismissed.

ORDER

15. Pursuant to Section 115 of the *Act*, I order that the Determination dated March 26, 2010, be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal