

An appeal

- by -

Brali Enterprises Inc.
(“Brali”)

- 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: Robert E. Groves

FILE No.: 2013A/53

DATE OF DECISION: October 9, 2013

DECISION

SUBMISSIONS

Shabnam S. Brar

on behalf of Brali Enterprises Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Brali Enterprises Inc. (“Brali”) has filed an appeal of a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on August 6, 2013.
2. The Delegate determined that Brali had acted in contravention of section 9(2) of the *Act* and ordered it to pay a monetary penalty in the amount of \$500.00.
3. I have before me the Determination, the Delegate’s Reasons for it, the Appeal Form and submission tendered by Brali, and the record that the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me.

FACTS

5. On July 4, 2013, the Agriculture Compliance Team of the Employment Standards Branch conducted a worksite visit at the farm operation of Brali in Abbotsford. They found a child named KB¹ hand harvesting blueberries. Asked for his date of birth, KB stated that it was October 5, 2001. He was, therefore, eleven years old.
6. Section 9(2) of the *Act* says this:
 - (2) A person must not employ a child under 12 years of age without the director’s permission.
7. No valid permit for KB was presented to the Team, and no record exists that such a permit had been issued by the Director.
8. The Delegate sent a letter to Brali dated July 8, 2013, setting out the relevant facts relating to the visit and the presence at work of KB. The letter also requested a response from Brali.
9. A principal of Brali named Shabnam Brar responded by letter dated July 11, 2013. Brar’s letter says this:

On July 4th the agricultural compliance team conducted a surprise visit to our farm. This was the first day for picking blueberries on our farm and we were not fully aware who was working in our field. Mr. [B]²

¹ KB is a minor child under the age of 12

² Identifying Mr. B. would identify KB. His name is therefore anonymized.

asked if he could pick berries for the day and I gave him permission. Unknown to me, his son was also with him. I did not give permission or hire [KB] [son] for any work, nor did I pay him any money. [KB] no longer comes to our farm. Yes, on July 4th he was in the field with his father, therefore according to section 9(2) we are guilty as per your letter July 8th [ER# 176-289] last paragraph we await “penalty will also accompany the issues of determination”.

10. On receipt of this correspondence, the Delegate concluded that Brali had confirmed that it had committed a contravention of section 9(2). His Reasons also say this.

Whether it was the first day of harvesting or that [KB] had come to the farm with his father is irrelevant as it is Brali’s responsibility as the employer to know who is working for them. The fact is Brali had a worker that was under the age of 12 working on their farm without having the appropriate child permit to do so. As a result I find that Brali has contravened Section 9(2) of the Act.

ISSUE

11. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

12. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

- 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.

13. Section 115(1) of the *Act* should also be noted. It says this:

- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

14. Brali’s Appeal Form asserts that the Determination should be cancelled on the grounds that the Delegate failed to observe the principles of natural justice.

15. A challenge to the Determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

16. The requirement for fairness is also mandated in section 77 of the *Act*, which reads:

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

17. A review of the facts set out above reveals no basis for a conclusion that the Delegate failed to observe the principles of natural justice. Not only did the Delegate inform Brali what had transpired, and the possible consequences of a finding that it had contravened section 9(2), he asked Brali for its response. Brali submitted a response.
18. There is no evidence the Delegate failed to take Brali's response into account when he issued his Determination. Indeed, the Delegate observed that the response appeared to confirm that a contravention had occurred.
19. There is also no evidence that the Delegate was anything other than an impartial decision-maker.
20. The real point of substance that Brali's submission on appeal focuses on is captured in a note from Brar attached to Brali's Appeal Form, and dated August 12, 2013. The relevant part of the note says this:

We did not instruct, direct or assign any work to [KB].... Furthermore, we did not receive any blueberries from him or pay him for work. Sometimes children do come to the farm with their parents and play on the playground.

Therefore, he is not an employee of Brali Ent. and Brali Ent should not be fined any amount.
21. Whether KB was an employee is a question of law. Accordingly, section 112(1)(a) is also engaged on this appeal.
22. The definition of "employee" in the *Act* is broad. This is in accord with the comments of the Supreme Court of Canada to the effect that the *Act* is benefits-conferring legislation. It ought, therefore, to be interpreted in such a manner as to extend its protections to as many employees as possible (see: *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986, and *Rizzolo & Rizzolo Shoes Ltd.* [1998] 1 SCR 27). One might also conclude that these statements should apply with at least equal, and perhaps greater, force when the persons involved are children.
23. The section 1 definition of "employee" includes not only persons who are receiving wages for work, but also "a person an employer allows, directly or indirectly, to perform work normally performed by an employee."
24. The unchallenged finding of fact made by the Delegate was that the Team found KB harvesting blueberries on the Brali property. There is no evidence that KB was doing so for his own enjoyment or that he had come to the Brali property with his father in order to play on the playground.
25. Further, it is a logical inference to be drawn from the evidence that Brali officials did not know that KB was harvesting blueberries because they were not supervising the work properly. As the farm operator, Brali was in charge of the work being conducted on the property. Brar stated in his July 11, 2013, letter to the Delegate that Brali officials were not aware of who was working in their field because it was the first day of picking blueberries on the farm. In my view, that is insufficient to absolve Brali from its responsibility to monitor the work that was being performed on the day in question.
26. During the visit to the Brali property, the Team appears to have had no difficulty finding KB harvesting blueberries. I infer, therefore, that if Brali officials had been monitoring the work with the requisite care, they would have observed KB working there. Since they do not appear to have done so, I conclude that KB falls within one of the definitions of "employee" in section 1 of the *Act* because Brali indirectly allowed him to perform work normally performed by Brali employees on the property.

27. I am also of the view that it makes no difference that Brali did not pay KB for his work. The section 1 definition of “employee” makes it clear that a person who performs work normally performed by an employee can be an employee for the purposes of the *Act*, whether he is paid for the work or not.

ORDER

28. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal