

An appeal

- by -

Fresh Harvest Farms Inc.
(“Fresh Harvest”)

- 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.: 2012A/67

DATE OF DECISION: August 16, 2012

DECISION

SUBMISSIONS

Sukhminder Bath

on behalf of Fresh Harvest Farms Inc.

Ravi Sandhu

on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed pursuant to section 112(1)(b) of the *Employment Standards Act* (the “*Act*”) by Fresh Harvest Farms Inc. (“Fresh Harvest”) and it concerns a Determination issued against it by a delegate of the Director of Employment Standards on June 8, 2012, (the “Determination”). By way of the Determination, the delegate levied two separate \$500 monetary penalties against Fresh Harvest (see section 98) for having contravened sections 17 (regular payment of wages) and 28 (keeping payroll records) of the *Act*.
2. Fresh Harvest says that the Determination should be cancelled because “the people on the lot were never employed by us”. Although the appeal is grounded on the assertion that the delegate failed to observe the principles of natural justice in making the appeal (subsection 112(1)(b)), it would appear that this appeal is more appropriately grounded under subsection 112(1)(a) (the delegate erred in law) inasmuch as Fresh Harvest appears to argue that it could not be penalized for failing to pay, or keep records relating to, individuals who were never in its employ. Fresh Harvest concedes it never maintained payroll records for 12 of the 15 individuals identified as Fresh Harvest employees in the Determination but, as noted above, says that it was not required to do so since it never employed those individuals.
3. I am adjudicating this appeal based on the parties’ written submissions. I have submissions from Fresh Harvest and the delegate. I have also reviewed the section 112(5) record that was before the delegate and the delegate’s “Reasons for the Determination” (the “delegate’s reasons”).

THE DETERMINATION

4. According to the information set out in the delegate’s reasons, on July 19, 2011, an Employment Standards Agricultural Compliance Team conducted a worksite visit at Fresh Harvest’s property on Mt. Lehman Road in Abbotsford. The Team observed several individuals hand harvesting raspberries. Following the site visit, a section 85(1)(f) demand for payroll records, dated November 1, 2011, was forwarded by registered mail, to Fresh Harvest. This demand was returned to the Employment Standards Branch as “unclaimed”. I understand that a second demand was then issued on November 22, 2011, and that Fresh Harvest responded by delivering certain records to the Employment Standards Branch’s Langley office on December 6, 2011.
5. The submitted records did not include any payroll information for several named individuals who were working at the farm on July 19, 2011, and who, in addition, stated that they were working for Fresh Harvest. On April 4, 2012, the delegate sent a letter to Fresh Harvest advising: firstly, its records indicated that 25 employees had not been paid vacation pay in accordance with section 58 of the *Act*; secondly, that payroll records were either missing (for 14 employees) or incomplete (for 16 employees); thirdly, that there was no record of payment of any wages for 4 employees, and, fourthly, that 10 employees had not been paid their wages in a timely manner contrary to section 17 of the *Act*. The delegate’s April 4, 2012, letter requested a written response by no later than April 19, 2012, (later extended to May 23, 2012).

6. On May 22, 2012, Fresh Harvest faxed a 1-page reply to the delegate in which it stated that it had no records for 12 named individuals. Fresh Harvest did not provide any response in regard to the other employees who were initially identified as being either within the “no records” or “incomplete records” groups. Fresh Harvest did not suggest that any of the individuals named in the delegate’s letter were not employees and, further, it referred to the 12 individuals it specifically identified as “workers”.
7. During the July 19, 2011, site visit, a Fresh Harvest principal confirmed that the workers named in the Determination were in fact Fresh Harvest employees and the Compliance Team observed that these individuals were working alongside other employees who were identified as such in Fresh Harvest’s payroll records.

FINDINGS AND ANALYSIS

8. There are two elements to the Determination. First, a \$500 penalty was issued for failing to have any payroll records for 15 named individuals (delegate’s reasons, page 6). Second, an additional \$500 penalty was levied with respect to the 10 employees who were not paid their wages in a timely manner as mandated by section 17 of the *Act* (delegate’s reasons, page 7).
9. Although Fresh Harvest seeks the outright cancellation of the Determination, it does not contest the second penalty relating to the late payment of wages. Quite simply, there is absolutely nothing in its material that would call into question this latter penalty. Given that this penalty was levied *based on Fresh Harvest’s own payroll records*, this is perhaps not surprising. In any event, this appeal must fail in regard to the second penalty.
10. I now turn to the first penalty, namely, the \$500 penalty levied for failing to keep any payroll records for 15 named individuals. Fresh Harvest’s appeal documents, and in particular its June 19, 2012, submission, simply states that it has no records whatsoever for 12 of the 15 employees named in the Determination. Fresh Harvest seemingly asserts that these 12 individuals were never employed by it although its submission is curiously worded – Fresh Harvest does not specifically deny that these 12 individuals were *not employed*; rather, it asks for “proof that these people were actually employed by Fresh Harvest Farms”.
11. Taking Fresh Harvest’s case at its highest, it still does not contest the employment status of 3 of the 15 employees named in the Determination. As for the remaining 12 employees, the evidence, as delineated in the delegate’s reasons, is that these persons were working at the farm on the day of the site visit; they were working alongside, and doing work identical to, other employees for whom Fresh Harvest had payroll records; they were identified as Fresh Harvest employees by one of Fresh Harvest’s principals; and they individually indicated that they were working for Fresh Harvest. Certainly, the foregoing constitutes proof well beyond the civil “balance of probabilities” burden that Fresh Harvest employed these 12 persons.
12. As noted earlier in these reasons, the thrust of Harvest Farm’s appeal is that the delegate erred in law in levying a \$500 penalty presumably because at least 12 of the 15 named persons were not Fresh Harvest employees. I find this unstated ground of appeal has no merit.
13. However, the formal ground of appeal is that the delegate failed to observe the principles of natural justice in making the Determination. There is absolutely no merit to this assertion. The record before me indicates the Determination was issued following a workplace inspection during which a principal of Fresh Harvest was invited to provide information. Prior to the issuance of the Determination, a detailed letter was sent to Fresh Harvest setting out preliminary findings and Fresh Harvest was requested to provide any information that would call into question any of these preliminary findings. There is no suggestion that the delegate was in a conflict of interest or that he otherwise was predisposed against Fresh Harvest. Most importantly, Fresh

Harvest has not suggested how or why there was a failure to comply with the rules of natural justice in this case.

ORDER

14. Pursuant to subsections 114(1)(c) and 115(1)(a) of the *Act*, this appeal is dismissed and the Determination is confirmed in the amount of \$1,000.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal