

An appeal

- by -

Mainland Farm Labour Supply Ltd.  
("Mainland")

- 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:** Shafik Bhalloo

**FILE No.:** 2007A/72

**DATE OF DECISION:** September 18, 2007

## DECISION

### OVERVIEW AND FACTS

1. This is an appeal by Mainland Farm Labour Supply Ltd. (“Mainland”) under Section 112 of the *Employment Standards Act* (“Act”) against a Determination of the Director of Employment Standards (the “Director”) issued May 30, 2007 (the “Determination”).
2. Mainland is a licensed farm labour contractor under the *Employment Standards Act* (the “Act”).
3. On April 21, 2006, Mainland was issued a farm labour contractor licence for a period of one year allowing Mainland to employ a maximum of 30 employees.
4. On November 20, 2006, a delegate of the Director (“the Delegate”) issued Mainland a Demand for Records pursuant to section 85(1)(f) of the Act requiring Mainland to produce to the Employment Standards Branch (the “Branch”), *inter alia*, payroll records, all direct deposit information, cancelled cheques, bank statements and daily log records required to be kept under section 6(5) of the *Employment Standards Regulation* (the “Regulation”).
5. Mainland complied with the Demand for Records and provided the requested records to the Branch.
6. After a review of Mainland’s records, the Delegate, on April 19, 2007, sent a letter to Mainland advising the latter of its contravention of section 40.2 of the Regulation for failing to pay all wages to farm workers in its employ by deposit to the credit of the farm workers’ accounts in a savings institution. In particular, the Delegate advised Mainland in the said letter that for the period July to October 2006, Mainland and its direct deposit service provider, Pay Works, issued cheques to Mainland’s employees for wages and did not pay wages by direct deposit into the employee’s accounts in a savings institution. The Delegate, in the same letter, invited Mainland to respond to his findings by no later than April 30, 2007.
7. On May 7, 2007, Mainland responded to the Delegate’s letter of April 19, 2007, and advised that its workers did not wish to give their banking information to Mainland. Mainland further advised that its payroll company, Pay Works, had also made an enquiry with the Branch and sought and obtained the Branch’s approval to pay wages to its employees by issuing cheques to its employees accompanied with a payroll stub. However, Mainland did not provide any details regarding who Mainland spoke to at the Branch or when the conversation took place. The Delegate, accordingly, was not persuaded that the Branch permitted Mainland to act contrary to the terms of section 40.2 of the Regulation.
8. As Mainland was otherwise not disputing the factual findings of the Delegate in the latter’s letter of April 19, 2007, the Delegate concluded that Mainland had breached section 40.2 of the regulation and ordered Mainland, pursuant to section 79(a) and (b) of the Act, to cease contravening section 40.2 of the Regulation and to comply with all requirements of the Act and Regulation.
9. Finally, as Mainland had contravened section 40.2 of the Regulation with respect to all its employees, the Delegate, for the purpose of imposing a penalty pursuant to section 29 of the Regulation, chose the very last occurrence as the date of contravention. The last occurrence where Mainland paid wages by a cheque to an employee was on November 7, 2007 to an employee by the name of Gurmail Singh Grewal (“Mr. Grewal”) for wages earned in and during the pay period October 16, 2006 to October 31, 2006.

Accordingly, the Delegate determined the date of the contravention of section 40.2 of the Regulation as November 7, 2006.

10. The Delegate also imposed on Mainland an administrative penalty of \$2,500 as this was a second contravention of section 40.2 of the Regulation on the part of Mainland within the last three years and section 29 of the Regulation mandated the said penalty in such a case.
11. The Delegate, after making the Determination, sent the executed copy of the Reasons for the Determination together with an unexecuted copy of the Determination to Mainland by registered mail on May 30, 2007.
12. Mainland appeals the Determination on two grounds, namely, that the Director erred in law as well as failed to observe the principles of natural justice in making the Determination. Mainland is requesting that the Tribunal cancel the Determination. Mainland is also seeking an oral hearing of its appeal. On the latter request, the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. More specifically, the appeal involves an analysis of the correctness of the Determination and the factual underpinnings of the Determination are not in issue. In the circumstances, the written submissions of the parties together with a review of the Determination and the section 112(5) "Record" will suffice in considering Mainland's appeal.

## **ISSUES**

13. The issues to be determined in this appeal are twofold:
  1. Did the Director of Employment Standards err in law in making the Determination?
  2. Did the Director of Employment Standards fail to observe the principles of natural justice in making the Determination?

## **ARGUMENT**

### ***Mainland's Submissions***

14. Mainland appeals on the grounds that the Director erred in law and that the Director failed to observe the principles of natural justice in making the Determination. Mainland's written submissions however do not relate to either ground. Instead, Mainland challenges the Determination on other grounds, which I will delineate briefly below.
15. However, first, I would like to point out that Mainland prefaces its substantive submissions by asserting that the Delegate, after inspecting Mainland's payroll records, only came across one individual or employee who was paid wages by way of a cheque, namely, Mr. Grewal. Mainland claims that Mr. Grewal did not have a bank account and therefore the Director is effectively penalizing Mainland with the \$2,500 administrative penalty because Grewal did not have a bank account.

16. Mainland, in its substantive submissions on appeal, delineates four arguments under separate headings. First, Mainland states that the Determination is a nullity because it lacks the issuing officer's signature, although the Delegate executed the attached Reasons for the Determination.
17. Secondly, Mainland argues that section 40.2 of the Regulation has a discriminatory effect against farm labour contractors such as Mainland and farm workers in that it requires the latter to maintain a bank account if employed by a farm labour contractor but not when a farmer directly employs them. Mainland also points out that if an employee works in any other field, he or she is not required to have an account with a savings institution, and this is discriminatory.
18. Thirdly, Mainland argues that section 40.2 of the Regulation contravenes the British Columbia *Privacy Act*, R.S.B.C. 1996, C. 373 as it compels a farm worker employed by a farm labour contractor to reveal his or her banking information to the farm labour contractor and that this may have the effect of discriminating against some farm workers who may not wish to be employed by a farm labour contractor if they have to give their private banking information to their employer.
19. Finally, Mainland argues that Regulation 40.2 is *ultra vires* section 127 of the Act, which provides for the Lieutenant Governor to make regulations in various areas delineated in the said section. Mainland also adds that section 40.2 of the Regulation is in direct conflict with section 23 of the Act which governs an employer's duty to make or remit assigned payments by an employee and where there is a conflict between a section of the Regulation and a section of the Act, the Act supersedes the Regulation and the Regulation is void.

### ***The Director's Submissions***

20. The Director submits that while the issuing officer executed the Reasons for the Determination and not the Determination itself, the lack of execution of the Determination is a mere technical irregularity, which is saved by section 123 of the Act.
21. With respect to the balance of Mainland's challenge to the legislative validity of section 40.2 of the Regulation, the Director argues that this is not a ground or basis for appeal and accordingly should be rejected.

## **ANALYSIS**

### ***Preliminary Point of Clarification***

22. As a preliminary matter, I would like to address Mainland's mischaracterization of the Delegate's findings of fact in the Determination. In particular, Mainland, in the preamble to its appeal submissions, states that the Delegate "came across only one (1) person (*namely Mr. Grewal*) that was paid via cheque due to the fact that he lacked a bank account at a savings institution". It is for this reason the Delegate imposed the \$2,500 administrative penalty on Mainland, argues Mainland. In my view, Mainland has grossly misread or mischaracterized the Delegate's findings of fact on this point. This is evident when one reads the fourth paragraph at page 4 of the Reasons for the Determination where the Delegate states "... section 40.2 of the Regulation was contravened for all employees (*of Mainland*)". However, for the purpose of an administrative penalty under section 29 of the Regulation, the Delegate opted to use the last occurrence of contravention as the date of contravention. In this regard, the Delegate found that the last

cheque for wages was issued by Mainland on November 7, 2006 to Mr. Grewal. Accordingly, Mainland's assertion that the Delegate only found a single employee who was paid by cheque by Mainland cannot be supported.

23. Furthermore, the \$2,500 administrative penalty imposed on Mainland was not in respect of a single contravention of section 40.2 of the Regulation, but a second contravention of the said section on the part of Mainland within a three-year period. The Legislature has sought fit to legislate a mandatory penalty scheme in section 29 of the Regulation. Under this mandatory scheme, the Delegate has no discretion as to whether an administrative penalty can be imposed, once the Delegate finds a contravention. Further, the amount of the administrative penalty is mandatory and fixed by the Regulation. The penalty scheme also takes into consideration recidivist employers by mandating significantly increased penalties in cases where employers repeatedly contravene the same provision or provisions of the Act or Regulation within a three-year period. In my view, this administrative penalty scheme in section 29 of the Regulation is in accord with the purposes of the Act set out in section 2. Moreover, the penalty scheme is also intended to serve as a deterrent to employers from repeatedly offending the same provisions of the Act by putting them at the risk of paying significantly higher penalties for each subsequent similar contravention within a three-year period.

#### ***Failure of the Delegate to Execute the Determination***

24. As indicated previously, while the Delegate executed the Reasons for the Determination, he did not execute the short two-page document entitled "Determination" which contains, *inter alia*, some formal language and a summary delineating the section Mainland contravened, the location of the contravention, the date of the contravention and the amount of the administrative penalty imposed. While Mainland does not dispute receiving the Determination and the Reasons for the Determination or argue that it was somehow prejudiced by not receiving an executed Determination, Mainland relies on the failure of the Delegate to execute the Determination in arguing that the Determination is therefore invalid.
25. In my view, the failure of the Delegate to execute the Determination is not a substantive error but a technical irregularity, which did not in any way prejudice Mainland. Section 123 of the Act, in my view, was legislated to address just such irregularities. Section 123 of the Act provides:

#### **Irregularities**

123. A technical irregularity does not invalidate a proceeding under this Act.

26. As previously noted, there has been no prejudice shown to Mainland as a result of the failure of the Delegate to execute the Determination. The Determination was correctly addressed to Mainland and Mainland received it in a timely fashion. Further, Mainland was not misled by the Delegate's failure to sign the Determination and indeed lodged its appeal of the Determination in a timely fashion. In my view, the failure of the Delegate to execute the Determination is nothing more than a technical irregularity, which is saved by section 123 of the Act.

***Balance of the Arguments of Mainland under the Headings “Discrimination” “Privacy Act” and “Enabling Legislation”***

27. While Mainland has, in its appeal form, checked off boxes indicating that its appeal is based on the grounds in section 112(1)(a) and (b), namely, error of law and breach of natural justice on the part of the Director, nothing in its submissions supports either of those grounds of appeal. To the contrary, I find there is sufficient evidence in the section 112(5) “Record” to support the conclusion that the Delegate afforded Mainland the procedural rights contemplated in the concept of natural justice. In particular, the Delegate, by way of his letter to Mainland dated April 19, 2007 afforded the latter an opportunity to learn the case against it and invited it to respond to the allegations contained therein. Mainland, in turn, responded to the allegations of contravention in the said letter and the Delegate, after considering Mainland’s response, made his reasoned Determination.
28. Furthermore, in making his Determination, the Delegate, in my view, did not err in interpreting section 40.2 of the Regulation, and therefore I do not find any basis for an appeal on the basis of error of law on the part of the Director either.
29. Having said this, I would like to note that as a result of the amendments to the Act which came into effect on November 29, 2002, the available grounds of appeal under the Act are limited to those set out in section 112(1) below:

**Appeal of director's determination**

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.

30. Accordingly, I am unable to entertain Mainland’s arguments based on the grounds that section 40.2 of the regulation is discriminatory or that it violates the *Privacy Act*. Even if I were able to entertain these grounds of appeal of Mainland, on the balance I do not find Mainland’s arguments compelling relative to the object and purpose of section 40.2 of the Regulation, namely, to address a concern that farm workers actually receive into their own accounts the amount of their wages. As stated by the Tribunal in *JKJ Contracting Ltd.* BC EST # D201/04 when reviewing the purpose of the legislative provisions affecting farm labour contractors:

A consideration of the Act and Regulation indicates that the object and purpose of this regulatory plethora is to protect the employees of farm labour contractors to ensure they are informed, are paid the wages to which they are entitled, and certain minimum standards are met with respect to their work. To put it another way, it is apparent that the mischief the statutory scheme addresses is the need to protect a vulnerable group. The statutory provisions address this mischief by imposing a strict licensing scheme on farm labour contractors.

31. Further, the object and purpose of section 40.2 of the Regulation is also consistent with the stated purposes of the Act, namely, to ensure that employees in British Columbia receive at least basic standards

of compensation and conditions of employment [S. 2(a)] and to promote fair treatment of the employees [S. 2(b)].

32. Finally, to the extent that Mainland is challenging the constitutionality of section 40.2 of the Regulation, section 46 of the Administrative Tribunals Act [SBC 2004] C.45 provides:

**Notice to Attorney General if constitutional question raised in application**

**46** If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

33. In this case, Mainland had not shown that it has complied with this provision.

**ORDER**

34. Pursuant to Section 115 of the Act, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**