

An appeal

- by -

Bains Berry Farm Ltd.
(the "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

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2004A/138

DATE OF DECISION: October 20, 2004

DECISION

OVERVIEW

This is an appeal by Bains Berry Farms Ltd. pursuant to section 112 of the Employment Standards Act (the "Act") of a Determination issued on 6 July 2004 by a delegate of the Director of Employment Standards (the "Director").

In the Determination, the delegate found that Bains Berry Farms Ltd. had contravened s. 46 of the *Employment Standards Regulation* (the "Regulation") by restricting entry and inspection under Section 85(1)(a) of the *Act* to an Agriculture Compliance Team on 29 June 2004. Pursuant to s. 29 of the *Regulation*, the minimum administrative penalty of \$500.00 was imposed and the delegate ordered that Bains Berry Farms Ltd. cease contravening the *Regulation* and comply with all requirements of the *Act* and the *Regulation*.

Bains Berry Farms Ltd. has requested that the Determination be cancelled on the grounds that the Director failed to observe the principles of natural justice.

FACTS

This case was decided without an oral hearing, based on the written submissions of the parties. There was no dispute raised concerning the essential facts of the case, as set out in the Determination.

At 9:00 a.m. on 29 June 2004, five members of the Agriculture Compliance Team (the "Team") attended to conduct a visit at a blueberry field located at 3394 168 Street in Surrey, B.C., which is owned and operated by Bains Berry Farms Ltd..

The Team approached Manjit Singh Bains, a Director of Bains Berry Farms Ltd., who was acting on behalf of the Employer. Two members of the Team explained to Mr. Bains the purpose of the site visit, which was to ensure that any farm labour contractors being used by the Employer were licensed under the *Act*, and that farm workers were being compensated in accordance with the *Act*.

Mr. Bains refused to permit the Team to enter the blueberry field to conduct the site visit and inspection. He explained that his workers were all direct, and he did not use a contractor. He stated that some of his employees were collecting a pension, and did not wish to speak to the Team. Mr. Bains added that he believed that the Team would cause damage, as they would scare workers away; and he had promised his workers that no one would bother them. Mr. Bains asked that the Team make an appointment and return at another time, as the workers had just started picking, and he could not afford to lose any of them.

The Team members informed Mr. Bains that the Team had the authority to enter a worksite where employees were performing work pursuant to section 85 of the *Act*, a copy of which was provided to Mr. Bains. In addition, the Team members advised Mr. Bains that the possible consequence of refusing entry would be a \$500.00 administrative penalty.

ISSUE

Did the Director err in imposing a penalty in this case?

ARGUMENT

The following reasons were provided by Bains Berry Farms Ltd. for appealing the Determination:

When the Delegate arrived at the farm we were extremely busy picking up the berries. We employ over 100 people and for the delegate to start talking to the workers considering that some of the workers do not speak English would have caused major disruptions. Our picking season is very short and any such disruption would result in a loss of thousands of dollars. The workers get very nervous about the interviews.

The Director's delegate replied as follows:

The Agriculture Compliance Team (the "Team") arrived at the work site in question at approximately 9:00 a.m. on June 29, 2004. It is usual practice for the Team to contact a farm owner or representative upon arriving at a work site. Two members of the Team approached Mr. Bains at the residence, which is on the farm, and informed him of the purpose of the visit.

The Team was denied entry to the work site to conduct an investigation in order to ensure compliance with the Employment Standards Act and Regulations. Mr. Bains was informed of the reasons for conducting the investigation; was given a copy of Section 85 of the Employment Standards Act and informed of the authority to enter during regular working hours any place where work is being done by employees; and, was made aware of the consequences for denying or restricting entry, yet he continued to deny entry. I have attached a copy of the handout that was provided to Mr. Bains.

If there are no disincentives against employers who fail to allow entry for the purpose of ensuring compliance with the Employment Standards Act and Regulations, then such conduct may be repeated. Therefore, the determination should stand in order to create a disincentive against employers who frustrate investigations by restricting or attempting to restrict the director from making an entry under section 85(1)(a) of the Act.

APPLICABLE LEGISLATION:

Section 85 of the *Act* provides as follows:

Entry and inspection powers

- 85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:
- (a) enter during regular working hours any place, including any means of conveyance or transport, where
 - (i) work is or has been done or started by employees,
 - (ii) an employer carries on business or stores assets relating to that business,
 - (iii) a record required for the purposes of this Act is kept, or
 - (iv) anything to which this Act applies is taking place or has taken place;
 - (b) inspect, and question a person about, any work, material, appliance, machinery, equipment or other thing in the place;

- (c) inspect any records that may be relevant to an investigation under this Part;
- (d) on giving a receipt for a record examined under paragraph (c), remove the record to make copies or extracts;
- (e) require a person to disclose, either orally or in writing, a matter required under this Act and require that the disclosure be under oath or affirmation;
- (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

Section 46(2) of the *Regulation* provides as follows:

- 46 (2) No person may restrict or attempt to restrict the director from making a entry under section 85(1)(a) of the Act.

With respect to penalties which may be imposed, I have reproduced section 29(1) of the *Regulation* below.

Administrative penalties

- 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
- (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;
 - (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;
 - (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.

ANALYSIS

In an appeal under the *Act* the burden rests with the appellant, in this case the Employer, to demonstrate an error in the Determination.

Bains Berry Farm Ltd. has not clarified, or explained the basis for, the allegation that the Director breached the principles of natural justice.

Section 85 of the *Act* contains broad entry and inspection powers, and the right of entry is not contingent upon receipt of a complaint, but rather on “ensuring compliance with [the] Act and regulations”. Pursuant to section 76(2) of the *Act*, the right of entry can be exercised whether the Director or delegate has received a complaint, or whether the Director has initiated an investigation without a complaint.

Bains Berry Farm Ltd. has failed to substantiate its claim that the Director breached the rules of natural justice. Based on the undisputed facts, Bains Berry Farm Ltd. was informed of the right of the Director to conduct the investigation, and the reasons for the investigation. Bains Berry Farm Ltd. was also advised of the consequences of failing to comply with the request to enter.

The Agriculture Compliance Team was nonetheless not permitted to have access to the property to conduct an investigation. In refusing to allow the Team to enter and inspect the property, Bains Berry Farm Ltd. contravened section 85 of the *Act* and section 46(2) of the *Regulation*.

Section 29 of the *Regulation* provides that the penalty for a contravention of Section 46 of the *Regulation* is \$500.00. There is no discretion to reduce the amount of the penalty. The penalty in this case was the amount prescribed by the legislation. It cannot, therefore, be successfully argued that the delegate erred in assessing the penalty in the Determination.

ORDER

Pursuant to Section 115 of the Act, the Determination dated July 6, 2004 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal