Employment Standards TRIBUNAL

An appeal

- by -

Super Farm Contractors Ltd.
("Thompson")

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/374, 2001/375 and 2001/376

DATE OF HEARING: August 7, 2001

DATE OF DECISION: August 29, 2001

DECISION

OVERVIEW

Super Farm Contractors Ltd. (which I will refer to as both "Super Farm" and "the Appellant") appeals, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), three Determinations by a delegate of the Director of Employment Standards ("the Director"), all of which are dated May 4, 2001. In one Determination ("the Order to pay $500"), Super Farm is ordered to pay a fine of $500 for a failure to keep records required by section 28 of the *Act*. In the second Determination ("the Licence Determination"), the delegate, for reason of the failure to keep records which are required by the *Act*, cancels Super Farm's licence to operate as a farm labour contractor. The third Determination ("the Order to pay $2,500") orders Super Farm to pay a $2,500 fine for operating without a farm labour contractor's licence.

The Appellant claims that it has not contravened the *Act* and that the delegate should not have imposed the penalties that he has or cancelled its farm labour contractor license. In the first respect, the Appellant argues that it did not violate the *Act* because the workers that it supplied were not employees but managers, subcontractors and/or family members and records were produced. It also questions how it is that a $2,500 fine is levied. And it argues that the decision to cancel the licence is all out of proportion to the offence. I have found, however, that Super Farm did in fact fail to keep records and that the Director may cancel the Appellant's licence. I have also found that there is evidence to support a conclusion that the Appellant was operating as a farm labour contractor without a licence and that the $2,500 penalty is appropriate. Accordingly, all three of the Determinations are confirmed.

The Appellant requested on oral hearing and one was set in this case, for the 7th of August, 2001. Counsel for the Appellant then requested that the hearing be adjourned. When I refused to grant an adjournment as requested, counsel announced that the Appellant did not wish to make any further oral submissions but would rely on its written submissions. The appeals have been decided on the basis of the written submissions.

APPEARANCES:

Sukhjinder S. Grewal	Counsel for Super Farm
J. Walton	For the Director

PRELIMINARY ISSUES

In asking for an adjournment, counsel for the Appellant complained that the Tribunal had not provided an interpreter even though, he said, one had been requested. Counsel also complained that he had not been given sufficient time to discuss, with his client, documents which were submitted to the Tribunal by the Director on July 23, 2001. In respect to the latter complaint, Counsel stated that it was not until the 1st of August that he received the documents and, as such, that left only one day for meeting with his client.

I decided against adjourning as requested. The requested adjournment is contrary to the need to provide "fair and efficient procedures for resolving disputes", a stated purpose of the *Act* (section 2). And I was satisfied that counsel had ample time to meet with his client. His arithmetic is faulty. It is not one day that counsel had for meeting with his client but 3 full working days, a 3 day holiday weekend, the afternoon of the 1st and, of course, the 7th, prior to the hearing.

I did accept that an interpreter was required despite the fact that the Tribunal has no record of a request for an interpreter. Fortunately, Punjabi/English interpreters are available on short notice.

An interpreter was ordered for 10:15 a.m. and I advised the parties that the hearing would be resumed at that time or, should the Appellant require additional time for discussing the documents which had been submitted by the Director, about 10:30 a.m.. On announcing that, the Appellant raised another objection to proceeding with the hearing. Counsel for the Appellant suddenly claimed a need for more time so that he could consult with people that had been named in the documents that the Director had submitted on the 23rd of July. It had apparently occurred to counsel that the persons might be important witnesses.

On hearing from the parties on this new issue, I again decided that an adjournment was not in order. I found that the names to which the Appellant was referring, and indeed the significance of the people to the appeal, is not new information which only came to light when the Director filed documents on the 23rd. It has been available to the Appellant for some months in that it forms part of the Order to pay $500. And the mere fact that the Appellant had failed to prepare for the hearing is not reason to adjourn a hearing.

THE ISSUES

At issue is the matter of whether the Appellant failed to keep records which are required by section 28 of the *Act*. The Appellant claims that it did not violate the *Act*. It claims that it is being fined for a failure to keep records for family members, persons that worked as managers and subcontractors.

At issue is the Director's decision to cancel the Appellant's farm labour contractor license. While Super Farm wants all of the Determinations overturned, it is concerned in particular with the decision to cancel the employer's licence. It describes that as "very much an overkill" and

that "a monetary penalty would be he (a?) more appropriate remedy than to deny a company the opportunity to do business in a highly regulated sector of the economy".

The $2,500 fine is an issue.

What I must ultimately decide is whether the Appellant does or does not show that there is reason to vary or cancel the Determinations, or refer a matter back to the Director, for reason of an error or errors in fact or law.

FACTS AND ANALYSIS

According to the Order to pay $500, there are four instances in which Super Farm failed to keep records as required by section 28 of the *Act*. Section 28 is as follows:

> **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.
>
> (2) Payroll records must
> (a) be in English,
> (b) be kept at the employer's principal place of business in British Columbia, and
> (c) be retained by the employer for 7 years after the employment terminates.

According to the Penalty Determination, Super Farm failed to keep proper employment records for employees who performed work at Tilson Berry Farm ("Tilson Farm"). Records produced

by the Tilson Farm indicate that Super Farm supplied Tilson Farm with labour between January 28, 2000 and May 29, 2000.

There is no dispute in respect to whether the Appellant supplied Tilson Farm with workers. It admits to doing so. It claims, however, that the workers are not employees but managers, family members, and subcontractors.

In a letter dated February 26, 2001, Super Farm stated that Balwinder Chohan, Manjit Purewal, H.S. Purewal, Inderjit Purewal and Gurnek Shergill worked on a daily basis at the Tilson Farm's cannery (wrongly spelled "canary" in the letter) and they were said to be part of Super Farm's management team. In a July 2, 2001 submission to the Tribunal, the Appellant states once again that some of the people that worked at the Tilson Farm were managers ("Only sub-contractors were arranged for by the employer and the other persons who performed work were part of a management team.").

The delegate has recognized that, while there are sections of the *Act* that do not apply to people that are "managers", a manager is still an employee and that section 28 requires an employer to keep records for all employees, managers included. I agree with that analysis. I very much doubt that all five of the above noted people fit the definition of manager but it is immaterial whether those workers were managers or not when they worked at the Tilson Farm. Section 28 of the *Act* requires that employers keep records for each employee. Super Farm did not. It failed to comply with that section of the *Act*.

It is immaterial whether a worker is or is not a family member.

The Appellant claims that the Director's finding is based on a non-existent admission. It states that "determinations that seek to rely on unrecorded, uncorroborated statements that cannot and should not be the basis of such statements (the Appellant may, here, have meant to use the word "determinations") is inherently defective and cannot and should not be upheld".

According to the Determination, Gurnek Shergill, on the 20th of February, 2001, led the Director to believe that records were in fact kept and that he would bring them in for the delegate. On appeal, he denies that he did so. I find that to be of no importance to the question of whether Super Farm did or did not fail to keep records which are required by the *Act*. I also fail to see how any of the Determinations depend in some important way on any of the statements which are said to have been made by Shergill in the Determinations but are now denied by him.

In that there is one instance of a failure to keep adequate payroll records, the Director may act to impose a penalty. A single contravention of the *Act* is sufficient to trigger a penalty under the *Act*. Section 98 is governing.

> **98** (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the

> director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

The penalty for a failure to keep records is a fixed amount. The amount is set by section 28 of the *Employment Standards Regulation* ("the *Regulation*").

> **28** The penalty for contravening any of the following provisions is $500 for each contravention:
>
> (a) section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the Act; … .

The Director has found that Super Farm failed to keep records required by section 28 of the *Act* and it has been decided that a $500 penalty should be imposed. I cannot think of any reason why one should not be in this case.

The Director identifies three other instances where Super Farm failed to keep proper employment records. According to the Director, Super Farm failed to keep records for another 10 of the workers that were supplied to Tilson Farm ("ten cannery workers").

The Director is a part of the Agriculture Compliance Team, a joint federal/provincial effort at identifying and combating corruption in the agricultural industry. That team conducted a search of the Bob Fetherstone Farm in Richmond on July 26, 2000. On August 4, 2000, it paid a visit to M&M Farms in Surrey. It found on both of those farms, workers that said that they worked for Super Farm (the team includes officers that are fluent in Punjabi). Despite that, Super Farm had not kept payroll records for the workers.

Super Farm would have me believe that these workers are not employees but independent contractors and as such, workers who are not covered by the *Act* (the Appellant refers to the workers as "subcontractors").

The *Act* defines an "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, … .

It is a very broad definition. And the workers were entitled to wages for work performed for another and they were allowed to perform work normally performed by employees. I realize, however, that there is a limit to which the definition of employee can be stretched.

In claiming that the workers are employees, Super Farm produces a number of 'agreements' as proof that they are not employees but independent contractors. There are 12 in all. On their surface, the 'agreements' do appear to be represent a contract between different business entities

in that work is undertaken for a fixed price, the 'subcontractor' is to provide their own tools and transportation, the 'subcontractor' is responsible for damages and the 'subcontractor' pays all taxes "including CPP and other federal taxes". The inescapable fact is, however, that the workers are low paid farm workers. The 'agreements' appear to me to be nothing more than an attempt to make low paid farm workers look like entrepreneurs in the hope that the obligations of an employer can be avoided. I cannot allow that.

> **4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

In summary, it is claimed that Balwinder Chohan, Manjit Purewal, H.S. Purewal, Inderjit Purewal and Gurnek Shergill worked at Tilson Berry Farm as managers but that is to say that they are employees and as they are employees, it follows that employer was required to keep records as set out in section 28 of the *Act*. The Director may impose a penalty for a single contravention of section 28 of the *Act*. In this case, however, there is clear evidence that there was not just one failure to keep records as are required by the *Act* but other instances as well.

I have decided to confirm the Order to pay $500.

The Licence Determination

The Director has cancelled the farm labour contractor licence that was issued to Super Farm. The stated reason for doing so is that Super Farm contravened section 28 of the *Act* in that it failed to maintain proper payroll records. By that the Director is referring to the Determination which is the Order to pay $500.

The licence is cancelled pursuant to section 7 of the *Regulation*. Section 7 is as follows:

> **7** The director may cancel or suspend a farm labour contractor's licence in any of the following circumstances:
>
> (a) the farm labour contractor made a false or misleading statement in an application for a licence;
>
> (b) the farm labour contractor is in breach of a condition of the licence;
>
> (c) the farm labour contractor or an agent of the farm labour contractor **contravenes the Act** or this regulation. (my emphasis)

The Director clearly has a discretionary power to cancel a farm labour contractor's licence if there is a contravention of the *Act*.

The Appellant argues that the Tribunal should cancel the Licence Determination and uphold one or both of the two penalties that have been imposed. It is suggested that is more appropriate. The Appellant describes the decision to cancel the employer's farm labour contractor licence as overkill. I will not act to reinstate Super Farm's farm labour contractor licence.

The Director's authority to cancel or suspend a licence is discretionary and the Tribunal has said that it will not interfere with that discretion "… unless it can be shown that the director failed to act in good faith or took into account irrelevant considerations" (*Ludhiana Contractors Ltd*., BCEST No. D361/98, p. 4). That is not true of this case. I am not shown that the Director, or her delegates, failed to act in good faith, nor that the Determination is based on an irrelevant consideration. I am satisfied, moreover, that the Appellant both fails to appreciate the need the keep records and the need to comply with the *Act*.

The Appellant complains about telephone calls in the middle of the night. And it argues that the telephone calls are both reprehensible or deplorable. I find it rather refreshing that a civil servant would work such hours and that the delegate has such an enthusiasm for his or her work. In part that is because I am satisfied that the telephone calls were made only as a last resort after numerous other attempts to contact the employer during normal business hours, and early in the evening, failed. There is nothing intrinsically wrong with the late night telephone calls given the circumstances.

The Licence Determination is confirmed.

The Order to pay $2,500

A farm labour contractor licence was granted to Super Farm on May 29, 2000.

The Director has determined that Super Farm was operating without a licence prior to the 29th of May in that it supplied workers to Tilson Farm. It is said that one of Super Farm's two directors, Manjit Purewal, on being interviewed on May 4, 2001 by J. Walton, one of the Director's managers, and Ravi Sandu, an employment standards officer, admitted that Super Farm had supplied at least 10 workers to Tilson Farm as early as January 28, 2000.

On appeal, the employer denies that Purewal made the statements that he is said to have made on February 14th and February 20th. There is no specific reference to statements made during the May 4 interview but I am prepared to accept that the employer is saying that Purewal denies whatever it is that he is reported to have said on that day too. I attach no importance to this, however. I have not been given an opportunity to hear directly from Purewal under oath. That is despite the fact that the Tribunal scheduled a hearing at the request of the Appellant.

I find that there is at least some evidence Super Farm supplied farm workers for Tilson Farm. I refer here to the records which were produced by Tilson Farm.

In a written submission, the Appellant alleges that no licence was required when it supplied workers to Tilson Farm because the work was not planting, cultivating or harvesting an agricultural product but work in the cannery, and also because an unspecified number of the workers are members of the immediate family of a director of Super Farm.

As noted above, it is immaterial that workers supplied to the Tilson Farm were immediate family.

A licence is required before a person may supply farm workers. Section 13(1) of the *Act* is clear on that.

> **13** (1) A person must not act as a farm labour contractor unless the person is licensed under this Act.

Nothing turns on whether the work that was performed at the Tilson farm was planting, cultivating or harvesting. The Appellant misconstrues the *Act*. What matters is whether the employees that did the work were or were not farm workers. The term "farm worker" is defined in the *Regulation* and that definition is as follows:

> "**farm worker**" means a person employed in a farming, ranching, orchard or agricultural operation, but does not include
> (a) a person employed to process the products of a farming, ranching, orchard or agricultural operation,
> (b) a landscape gardener or a person employed in a retail nursery, or
> (c) a person employed in aquaculture; … .

The workers that Super Farm supplied to the Tilson Farm sorted berries in the cannery. The question is, Were the workers employed to process products or were they employed in a farming or agricultural operation?

Neither the *Act* nor the *Regulation* define "process" or "farming" or "agricultural operation". The common definitions of "process" include "a series of operations performed in the making or treatment of a product" and the common definition of "processing" includes "to prepare, treat, or convert by subjecting to a special process" [*Canadian Dictionary of the English Language*, ITP Nelson, 1997 edition].

In my view, sorting berries is not to prepare, treat or convert them by subjecting them to a process unless it is an integral part of a processing operation. As matters are presented to me, there is no evidence of the latter, indeed, it is not even suggested by the Appellant. I therefore find it reasonable for the Director to have concluded that Super Farm supplied workers for an agricultural operation and that the *Act* was therefore contravened, Super Farm not having a farm labour contractor licence to supply that farm labour.

The Appellant questions the amount of the $2,500 fine.

There is to be no acting as a farm labour contractor without a licence and to do so is to contravene a specified provision of the *Act*. The specified provisions of the *Act* are set out in Appendix 2 of the *Regulation*. Section 13(1) is a specified provision in that it is listed as such in that Appendix.

Fines for violations of specified provisions of the *Act* are to be in accordance with section 29(2) of the *Regulation*.

> **29** (2) The penalty for contravening a specified provision of a Part of the Act or of a Part of this regulation is the following amount:
> (a) $0, if the person contravening the provision has not previously contravened any specified provision of that Part;
> (b) $150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion;
> (c) $250 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 2 previous occasions;
> (d) $500 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on 3 or more previous occasions.

The Director has imposed a fine of $250 on the basis that this is the third time that Super Farm had contravened Part 2 of the *Act*, section 13(1) in all three cases, and 10 employees are affected by this particular contravention. $250 x 10 is of course $2,500.

I am shown that a Determination dated June 12, 1998 was issued against Super Farm. In that Determination, Super Farm was issued a $nil penalty for a contravention of section 13(1).

I am shown that a second Determination against Super Farm was issued on July 2, 1998. In that case the Director found a number of raspberry pickers working for Super Farm and that the employer had again violated section 13(1) of the *Act*. A fine in that case was imposed on the employer pursuant to 29(2)(b) of the *Regulation*.

The Director has in this case found that Super Farm supplied farm workers to Tilson Farm when it did not have a farm labour contractor licence and I have found that there is evidence to support that conclusion. As it is the third time that the employer has contravened Part 2 of the *Act*, section 29(2)(c) of the *Regulation* is operative.

The Order to pay $2,500 is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the three Determinations which are against Super Farm Contractors Ltd., and are dated May 4, 2001, be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal