

An appeal

- by -

Grewal Berryfarm Inc.
("Grewal" or "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

ADJUDICATOR: Paul E. Love

FILE No.: 2001/553

DATE OF DECISION: September 18, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Grewal Berryfarm Inc. (“Grewal” or “Farmer”), from a Determination dated July 19, 2001 issued by a Delegate of the Director of Employment Standards (“Delegate”). Grewal refused entry to a blueberry field to members of the Agriculture Compliance Team (“Team”), in order to interview employees brought to the property by a farm labour contractor. At the time of the refusal, Grewal was aware of the nature of the investigation, and the power of the Director to inspect. Grewal apparently refused access because of concerns expressed with the Team interfering with the work of the employees and damage to the blueberry crop. The Director has the power to inspect under S. 85 of the Employment Standards Act (the “*Act*”) and this inspection was within the scope of the power. It is not for the farmer to place limitations on the Delegate’s power to inspect under s. 85 of the *Act*. Section 85 of the *Act* specifically contemplates inspection of places within working hours, and therefore contemplates that there would be some degree of disruption to the employees’ productivity in the workplace. There are alternative remedies available to a farmer whose property is damaged during the course of an inspection, and a belief of the possibility of damage is not a sufficient excuse. The reasons advanced by the Farmer for limiting the inspection are not accepted by the Tribunal in light of the deceit by the Farmer during the course of the investigation concerning the presence of farm labour contract employees on its site.

FACTS

This case was decided on the basis of written submissions of the parties, without an oral hearing. There is no substantial dispute concerning the essential facts.

On July 16, 2001 at 9:05, three members of the Agriculture Compliance Team of the Employment Standards Branch (“Team”) attended at Grewal Berryfarm Inc., located in Abbotsford, B.C. The Team attended for the purpose of a site investigation concerning the employees and a farm labour contractor, Lumas Enterprises Ltd. At the time the Team approached the farmer, a Delegate with the Team was aware of a bus licenced to Lumas Enterprises Ltd., on the farm property. The Team identified themselves to Mr. Grewal, and indicated that they wished to conduct short interviews with any farm labour contractor employees to determine if they were being compensated in accordance with the *Act*. Mr. Grewal was informed of the reasons for the investigation, the power of the Director to investigate, and the penalty consequences for denying or restricting entry.

In its written submission the Delegate states that the farm labour contractor under investigation, Lumas Enterprises Ltd. has “an extensive history of non-compliance with the Employment Standards Branch including, repeat violations for operating without a valid farm labour contractor license, repeat violations for failure to pay wages at least semi-monthly, repeat violations for failure to pay statutory holiday pay, failure to pay overtime and failure to pay vacation pay.”

Significant to this case, is the fact that when the Team attended and advised of the nature of the investigation, Mr. Grewal denied that there were any farm labour contractor employees on his site, and indicated that only his own employees were on site. This statement was untrue. After the Team members advised Mr. Grewal that they had seen the bus for a farm labour contractor, Lumas Enterprises Ltd., Mr. Grewal admitted that there were farm labour contract employees on his farm. Mr. Grewal then took the Team to the bus, and permitted an interview of an employee of the farm, who was harvesting blueberries near the bus and on the outside road of the field. I find at the time of the initial contact Grewal knew that it had farm labour contract employees on its site, supplied by Lumas Enterprises Ltd..

While one Team member conducted the interview, the balance of the Team members walked towards the other end of the field where the balance of the employees were located.

Mr. Grewal stated that he did not want any members of the Team entering the blueberry bushes as he did not want berries falling from the bushes. He indicated that the Team could wait in the fields at the end of the rows until the workers came out, or could wait by the bus. He insisted that the Team wait until lunchtime when the employees would be coming out of the field. When he was asked at what time the employees would be taking lunch, Mr. Grewal responded “maybe 12:00 pm, could be 1:00 p.m., I don’t know, the employees are being paid piece rate so they take lunch when they want”

The Team was not permitted entry to the blueberry bushes, and were not permitted access to the employees. The entry was prevented by Mr. Grewal. In its appeal submission Grewal did not challenge the following facts set out in the Determination:

Mr. Kaila explained to Mr. Grewal that the Team could not wait around all day for the employees to take their lunch break. Mr. Kaila further explained to Mr. Grewal that the Team had conducted many site inspections in blueberry fields in the past and has not ever had a problem or any complaints of berries falling on the ground. Mr. Grewal insisted that he would not allow the Team to enter the field nor would he call the workers outside the field for the Team to conduct interviews.

Mr. Grewal refused to accept delivery of a pamphlet which sets out the Director’s right of inspection.

Mr. Grewal refused entry to the Team. The Team was not able to conduct a head count of workers on site, as the workers were not visible from the outside of the blueberry bushes. The Team was unable to determine whether the farm labour contractor, Lumas Enterprises Ltd., was operating in compliance with the *Act* and their bond. The Team determined at the site that Lumas Enterprises Ltd. was not in compliance with the section of the *Act*, which requires the Farm Labour Contractor to maintain onsite, and make available for inspection a daily log containing the list of all employees on site. The driver of the bus was able to give verbally the names of twelve employees to the Team.

In his appeal submission, the farmer indicated:

Three members had asked to conduct short interviews with the employees in the berry field while they were picking. I asked them to wait until they were on a lunch break or they would have to make an appointment or to come and see them right after work. I did not want them to enter my full ripe field and make the berries fall on the ground because it would cost me high wages plus damage to the crop.

I am willing to let them conduct their investigation but it has to be out of my crop area otherwise the farmer and the employees are both losing. If they come during work hour I still have to pay the worker and they are all on hourly wages that way it is costing me for something that was not done for my farm.

I note that the method of paying the employees, advanced by the Farmer in the appeal submission, is different from the piece method advanced by the Farmer to the Team at the time of the investigation.

The Delegate imposed a \$500.00 penalty, pursuant to section 28(b) of the *Employment Standard Regulation*, and ordered that Grewal Berryfarm Inc. cease violating the *Employment Standards Act*.

ISSUE:

Did the Delegate err in imposing a penalty in the circumstances of this case?

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Farmer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

The Director or a delegate has the power to enter onto private property. This power is set out in s. 85 of the *Act*:

85(1) For the purpose of ensuring compliance with this Act and the Regulation, 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 employee,
 - (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

In my view, there was a violation of section 85 of the *Act*. The farmer further appears to have attempted to mislead members of the Team concerning the presence of farm labour contractor employees on his farm. This is a deceitful statement, because Mr. Grewal then lead the Team to the bus. In light of the deceit, I find it difficult to accept the farmer's explanation that he wanted to protect his berries from the Team. There appears, rather, to have been a deliberate attempt on the part of the farmer to frustrate the investigation.

I note that the Delegate does have extensive powers to inspect any place, for the purpose of ensuring compliance with the *Act*, and those powers should not be subject to limits placed by the employer or landowner. There are different rules concerning inspection of dwelling places, but that is not an issue in this case. The inspection power is limited to an entry during "regular working hours". Presumably in enacting the legislation the legislature must have known that there would be some degree of disruption to the performance of work while the Director is conducting the investigation. What the employer suggests is that it can control the investigation by not allowing the Director to inspect in the work place (eg. the field), require the Director to wait until a time more convenient to the employer (when the employees cease work), or inspect after working hours (which is outside the scope of the Delegate's powers). Allowing the employer to control an investigation by controlling the site, and the employees located within the site, would unduly frustrate an investigation.

A person concerned about damage caused by a Delegate during the course of an investigation has other remedies. Here there is no legitimate basis for the farmer to believe that the Team would damage or destroy property. In my view, even if the belief of the farmer was reasonably held (which it is not) this would not be a basis for the farmer to deny entry to the Delegate. An employer who has a legitimate concern has other avenues to pursue this concern.

When a person fails to permit the Director to inspect under section 85(1) of the *Act*, that person also breaches section 46(2) of the *Employment Standard Regulation* which provides:

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

Section 28(b) of the *Regulation* creates a penalty of \$500.00 for each contravention of s. 46 of the *Regulation*. In my view, the purposes of the *Act*, would be frustrated if a person is permitted to limit the powers of the Director to inspect a workplace during ordinary working hours. For the above noted reasons, I find that the Director imposed properly a penalty in the amount of \$500.00 on Grewal Berryfarms Inc.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated September 12, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal