

An appeal

- by -

Elite Farm Services Ltd.

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** Robert E. Groves

**FILE NO.:** 2018A/98

**DATE OF DECISION:** November 28, 2018

## DECISION

### SUBMISSIONS

Dwayne Dueck

on behalf of Elite Farm Services Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Elite Farm Services Ltd. (“Elite”) has filed an appeal of a determination (the “*Determination*”) of a delegate (the “*Delegate*”) of the Director of Employment Standards (the “*Director*”) dated August 9, 2018.
2. In the *Determination*, the *Delegate* held that Elite had contravened subsections 6(1)(a), 6(1)(d), and 6(1)(f), as well as section 6.1, of the *Employment Standards Regulation* (the “*Regulation*”). The *Delegate* ordered Elite to pay \$4,000.00 in administrative penalties in respect of these contraventions, pursuant to section 98(1) of the *ESA* and section 29(1) of the *Regulation*.
3. Elite’s appeal asserts, as grounds for its appeal, that the *Determination* should be varied because the *Director* failed to observe the principles of natural justice and evidence has become available that was not available at the time the *Determination* was being made.
4. I have before me the *Determination*, the *Delegate*’s Reasons in support of it, Elite’s Appeal Form material, Elite’s submission in support of its appeal, and the record the *Director* is required to provide to the Tribunal pursuant to subsection 112(5) of the *ESA*.
5. Subsection 114(1) of the *ESA* stipulates that the Tribunal may dismiss all or part of an appeal, at any time after an appeal is filed and without a hearing, if any of a listed number of criteria is satisfied. In this instance, I am persuaded that it is appropriate to consider the criterion established in subsection 114(1)(f). That subsection permits the Tribunal to dismiss an appeal if it determines there is no reasonable prospect that the appeal will succeed.

### ISSUE

6. Should the appeal be permitted to proceed, or should the Tribunal exercise its discretion pursuant to subsection 114(1)(f) and dismiss the appeal because there is no reasonable prospect that it will succeed?

### THE FACTS

7. Elite is a corporation licensed to act as a farm labour contractor under the *ESA*.
8. On May 17, 2018, the Employment Standards Branch Agriculture Compliance Team (the “*Team*”) conducted an inspection of a van owned by Elite, which it used to transport farm workers.

9. As a result of that inspection, the Team determined that Elite was in contravention of the following provisions of the *Regulation*:
- subsections 6(1)(a) and (d), requiring, respectively, a farm labour contractor to display “prominently”, on all vehicles used for transporting employees, a copy of its farm labour contractor licence issued under the *ESA*, and the wages the farm labour contractor is paying to its employees;
  - subsection 6(1)(f), requiring a farm labour contractor to file with the Director an up-to-date list of the registration numbers and licence numbers of each vehicle used by the contractor for transporting employees and, if the vehicle is owned by the contractor, copies of the inspection certificate and other records that must be maintained under section 25 of the *Motor Vehicle Act Regulations*; and
  - section 6.1, requiring a farm labour contractor to post, in every vehicle used by the contractor to transport employees, a safety notice provided by the Director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and *Workers Compensation Act*.

## ARGUMENT

10. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:
- 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.
11. Subsection 115(1) of the *ESA* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
  - (b) refer the matter back to the director.
12. Elite’s appeal submission makes it clear that it takes no issue with the Determination as regards the Delegate’s conclusions relating to subsections 6(1)(a) and 6(1)(d), and section 6.1 of the *Regulation*. Elite’s challenge only concerns the Delegate’s decision relating to subsection 6(1)(f). As I have stated, Elite bases its appeal on the natural justice and evidentiary grounds referred to in subsections 112(1)(b) and (c) of the *ESA*, respectively.
13. In my view, there is no reasonable prospect that Elite’s appeal can succeed on either of these grounds.

14. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
15. The requirement for fairness is also mandated in section 77 of the *ESA*, which reads:
- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
16. A review of the record reveals that the Delegate communicated the substance of the Team's findings in writing to Elite and that Elite took full advantage of the opportunity to respond prior to the issuance of the Determination. Elite has produced no evidence that the Delegate proceeded in a manner that was unfair. I conclude, therefore, that Elite has established no basis for a finding that the Delegate failed to observe the principles of natural justice.
17. The Tribunal's power to allow an appeal under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach is embedded in subsection 2(d) of the *ESA*, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would hinder the achievement of that purpose if an appellant were to be permitted, as a matter of routine, to seek out new evidence to bolster a case which failed to persuade at first instance. Conversely, proceedings under the *ESA* are likely to be more fair and efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase, and present it to a delegate before a determination is issued.
18. Here, Elite's submission regarding subsection 112(1)(c) is but a slightly more detailed version of what it communicated to the Delegate during her investigation leading to the issuance of her Determination. As regards subsection 6(1)(f) of the *Regulation*, Elite says this in its appeal submission:
- it sent updated insurance and inspection documentation regarding its vehicles to the Director early in April 2018, following the expiry of the vehicle insurance for its fleet at the end of March of that year;
  - it sent that documentation by regular mail, and so there was no mechanism in place to prove that it had actually been sent, or if it had been sent, whether it was ever received by the Director.
19. This evidence was not only available to Elite, it was also communicated to the Delegate before the Determination was issued. There is no basis, therefore, for Elite's claim that its appeal should be allowed on the basis that evidence has become available that was not available at the time the Determination was being made. Indeed, Elite's submission on appeal is more in the nature of a re-argument of the position it articulated during the investigation of the Team's findings by the Delegate.
20. In my opinion, Elite's reliance on subsections 112(1)(b) and (c) of the *ESA* is misconceived. It should, instead, have grounded its appeal on subsection 112(1)(a), which permits a challenge to a determination on the basis that the Director has erred in law.

21. The fact that Elite has misdescribed the grounds for its appeal is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST # D141/03).
22. I interpret Elite's appeal submission to raise the question whether the Delegate erred in law in deciding that Elite was in contravention of subsection 6(1)(f) of the *Regulation* when it mailed its registration and inspection documentation to the Director by regular mail, in circumstances where the Director asserts that the documentation was never received. In my opinion, that assertion engages subsection 112(1)(a) of the *ESA*.
23. I will first address a statement made on behalf of Elite in its appeal submission. It asks whether there is a possibility the documentation forwarded by Elite was misplaced in the office of the Director. While one might argue that such an event is perhaps possible, it is, nevertheless, highly improbable. The burden of proving such an eventuality must lie on Elite. In the absence of any evidence suggesting that a failure to receive was due to some misfortune attributable to the office of the Director, I decline to conclude that the documentation was received, but then lost, before it could be accounted for to the benefit of Elite.
24. Apart from Elite's suggestion that its mailing was somehow lost after it was delivered to the Director, its submission, in substance, is that a mailing of the requisite documentation by regular mail complies with the obligations imposed by subsection 6(1)(f) of the *Regulation*, notwithstanding that the documentation was not received by the Director.
25. I cannot accept this submission.
26. Subsection 6(1)(f) says that a farm labour contractor must "file" the requisite documents. The *New Shorter Oxford English Dictionary* has defined the verb "file" to mean, *inter alia*:
- "...place (a document etc.) on file; put *away* in a file."
  - "Place (a document) on file among official records by formal procedures of registration"
27. These definitions imply an actual receipt by the Director of the documentation noted in subsection 6(1)(f), and not a mere attempt to effect delivery, which turns out to be ineffectual.
28. In my view, the words used in subsection 6(1)(f) make it clear that it is a farm labour contractor's obligation to deliver the requisite documentation, and not the Director's responsibility to ensure it is received. The purpose of provisions like subsection 6(1)(f) is to limit the risk of harm to farm workers who travel in vehicles provided by a contractor for transport to and from a work site. If contractors are not fully in compliance with the letter and spirit of these statutory requirements, it diminishes the ability of the Director to deploy effectively the enforcement measures that have been established for the purpose of ensuring that these workers are protected.

**ORDER**

29. Pursuant to section 115 of the *ESA*, I order that the Determination be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**