

An appeal

- by -

Elite Farm Services Ltd.
(“Elite”)

- 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.: 2012A/144

DATE OF DECISION: January 16, 2013

DECISION

SUBMISSIONS

Robert Balazs

on behalf of Elite Farm Services Ltd.

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Elite Farms Services Ltd. (“Elite”) of a determination that was issued on October 25, 2012, (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. The Determination found that Elite contravened section 13 of the *Act* and sections 6(1)(f) and 6.1 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered Elite to pay administrative penalties under section 29(1) of the *Regulation*. More specifically, the Determination ordered Elite to pay \$500 each for breaches of section 13 of the *Act* and section 6(1)(f) of the *Regulation*, and \$2,500 for breach of section 6.1 of the *Regulation*, as the latter breach was the second breach of Elite within three (3) years.
3. In its appeal, Elite does not challenge the breaches or penalties levied against it for contraventions of section 13 of the *Act* or section 6(1)(f) of the *Regulation*, but disputes the finding of a breach of section 6.1 of the *Regulation*. In its Appeal Form, Elite bases its appeal on the ground that the Director erred in law in making the Determination, and seeks the delegate “to waive” the \$2,500 penalty levied in respect of the breach of section 6.1 of the *Regulation*.
4. I note that Elite’s appeal was filed on December 6, 2012, when the deadline for filing its appeal was December 3, 2012. Robert Balazs (“Mr. Balazs”), a Director of Elite, in his written submissions on behalf of Elite, apologizes for the late filing of Elite’s appeal and explains that he “was under the impression that it was already dealt with by one of [Elite’s] staff”.
5. Pursuant to Rule 22 of the Tribunal’s *Rules of Practice and Procedure* and section 114 of the *Act*, the Tribunal may dismiss all or part of an appeal without seeking submissions from the concerned parties. If the Tribunal does not dismiss the appeal or confirm all of the Determination, the Tribunal, as indicated in the Tribunal’s January 9, 2013, correspondence to both Elite and the Director, will invite the Director to file a reply to the question of whether to extend the deadline to file the appeal and, thereafter, afford Elite an opportunity to make a final reply to the submissions, if any. In my view, this appeal may be adjudicated on the basis of the section 112(5) “record”, the Reasons for the Determination (the “Reasons”) and the written submissions of Elite, without requiring either party to make further submissions.

ISSUE

6. The issue in this appeal is whether Elite has shown the Director erred in law in making the Determination.

FACTS

7. Elite is a farm labour contractor (“FLC”) who was issued a FLC licence by the Employment Standards Branch (the “Branch”) on June 14, 2009, for up to 40 workers. That licence expired on June 14, 2012.

8. The FLC licensing process requires applicants to pass a written examination in order to satisfy the Director of their knowledge of the *Act* and the *Regulation*. Further, prior to the written examination, applicants are issued an application package that includes a study guide on the relevant requirements of the *Act* and the *Regulation*. As well, during the licensing process, the Branch reviews with the applicants a checklist to ensure their understanding of the requirements of the *Act* and the *Regulation*. The checklist includes a review of section 13 of the *Act*, which requires that a person must not act as a farm labour contractor unless the person is licensed under the *Act*; section 6(1)(f) of the *Regulation*, which requires a FLC to file with the Director an up-to-date list of the registration numbers and licence numbers of each vehicle used by the FLC for transporting employees; and section 6.1 of the *Regulation*, which requires a FLC to post, in every vehicle used by the FLC to transport employees, a notice provided by the Director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers' Compensation Act*, including driver, seating and seatbelt requirements. This notice must be posted in one or more locations in every vehicle used to transport employees and must be “clearly visible to the driver or operator of the vehicle and to employees riding in the vehicle”.
9. On September 20, 2012, the Branch’s Agricultural Compliance Team (the “Team”), together with Commercial Vehicle Safety and Enforcement and WorkSafe BC, conducted roadside checks to inspect vehicles used to transport farm workers with a view to ensuring that farm labour vehicles are registered with the Branch and have a vehicle safety notice posted. As part of the roadside checks, the Team stopped a vehicle with a licence plate no. “BG 9862”, which Elite was using to transport 13 employees to Barden Farm in Abbotsford to harvest an agricultural product - to catch poultry. While Elite was issued an FLC licence for 40 workers on June 14, 2009, as indicated previously, the license expired on June 14, 2012. Therefore, on September 20, 2012, the Team found that Elite was operating with an expired FLC licence.
10. The Team also inspected the subject vehicle for the required vehicle safety notice, but was unable to find the same. As a result, the Team asked the driver of the vehicle, Steve Fulford (“Mr. Fulford”), if a safety notice, as required in section 6.1 of the *Regulation*, was posted in the vehicle. Mr. Fulford looked for the notice in the vehicle, but failed to produce one or show to the Team that one was posted in the vehicle.
11. On September 27, 2012, a representative of Elite telephoned the Branch and requested information about renewing Elite’s FLC licence, and the Branch provided Elite’s representative a study package and an application form.
12. Subsequently, on October 2, 2012, the Branch sent a letter to Elite (the “Letter”) setting out the Team’s findings of the September 20, 2012, roadside check of Elite’s vehicle. In particular, the Letter set out that Elite was operating with an expired FLC licence on September 20, 2012, and was, therefore, in contravention of section 13 of the *Act*. The Letter also alleged that the subject vehicle used by Elite to transfer farm labourers was not registered with the Branch, in contravention of section 6(1)(f) of the *Regulation*, and the vehicle did not contain a safety notice at the time of the inspection, contrary to section 6.1 of the *Regulation*. The Branch provided Elite an opportunity to respond to the Team’s findings by October 15, 2012.
13. On October 16, 2012, one of Elite’s Directors, Mr. Balazs, sent a fax to the Branch in response to the Letter, acknowledging that Elite had “forgotten to renew the labour contract license” and would “make sure to comply with section 6 of the Employment Standards Regulation”. However, Mr. Balazs denied Elite breached section 6.1 of the *Regulation*, stating that the safety notice was “clearly visible” and “posted in the vehicle”.
14. On October 25, 2012, the Branch issued the Determination finding Elite to have contravened section 13 of the *Act* and sections 6(1)(f) and 6.1 of the *Regulation*. On the subject of the breach of section 6.1 of the

Regulation, the delegate reasoned that the evidence collected by the Team during the roadside check contradicted Elite's argument that the safety notice was posted in its vehicle. In particular, the delegate noted that the Team inspected the interior of the vehicle and did not find a posted safety notice anywhere, and when the Team asked Mr. Fulford, Elite's driver, if there was a safety notice posted, he checked, but "it was not posted and he was unable to produce it". The Team then provided Mr. Fulford a copy of the safety notice to post in the vehicle.

ARGUMENT

15. In Elite's appeal, Mr. Balazs reiterates the position Elite advanced during the investigation and before the Determination was made; namely, that the safety notice was posted in Elite's vehicle. He attaches a copy of a photo of what appears to be a safety notice posted, arguably in a conspicuous manner, on one of the door windows of the vehicle. Whether or not it is the same vehicle that was inspected or not is not evident from the picture. He states that "...we made sure to post after we were penalized for not having this in place in 2011". He also states that all of Elite's vehicles used to transport employees have such a notice posted, and he requests that the Tribunal "waive the \$2,500 penalty" for breach of section 6.1 of the *Regulation*. He states that Elite "will take care of the payment for the \$1,000" with respect to the other two (2) breaches, namely, section 13 of the *Act* and section 6(1)(f) of the *Regulation*.

ANALYSIS

16. The *Act*, in section 112(1), delineates the limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director. The section reads as follows:
- 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.
17. In Elite's Appeal Form, it has checked off the error of law ground of appeal in section 112(1)(a). The Tribunal has, time and again, indicated that the burden is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which the appellant's appeal may be dismissed.
18. It is also noteworthy that the Tribunal has authority under section 114 of the *Act* to dismiss an appeal where the Tribunal finds that there is no reasonable prospect that the appeal will succeed. Having said this, I note that Elite's Mr. Balazs has provided the same argument or explanation that he provided to the delegate during the investigation, prior to the Determination, namely, that the safety notice was posted in the vehicle the Team checked. He purportedly provides a photo of that safety notice. As indicated previously, the notice shown in the photo appears to be conspicuously posted on a door window of a vehicle and would appear to be visible to the naked eye. However, the Team did not find this notice when it searched the interior of the vehicle and, incredibly, nor did Elite's vehicle driver, Mr. Fulford.
19. I also note that Mr. Fulford's evidence is noticeably missing in Elite's response to the Letter from the Branch during the investigation as well as in Elite's appeal. One would have thought that if Mr. Fulford, as Elite's

driver of the subject vehicle, thought or believed that the safety notice was posted in the vehicle, he would have not only been able to identify it to the Team during the roadside check but Elite would have obtained his statement and proffered same in the investigation as well as in Elite's appeal. Elite's failure to adduce Mr. Fulford's evidence during the investigation and in the appeal only lends more credence to the Director's conclusion in the Determination that the safety notice was not posted in the vehicle at the time of the roadside check. Having said this, this is a case that squarely falls under section 114(1)(f) of the *Act*; that is, there is, in my view, no reasonable prospect that Elite's appeal will succeed, and, therefore, I dismiss it under the said section of the *Act*.

ORDER

20. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal of Elite Farm Services Ltd.

Shafik Bhalloo
Member
Employment Standards Tribunal