

An appeal

- by -

Dhillon Labour Contractors Ltd.  
("Dhillon")

- 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:** Carol Ann Hart

**FILE No.:** 2007A/138

**DATE OF DECISION:** January 15, 2008

## DECISION

### SUBMISSIONS

Pawan Sachdeva, Accountant   on behalf of Dhillon Labour Contractors Ltd.  
Karry Kainth    on behalf of the Director

### OVERVIEW

1. This is an appeal by Dhillon Labour Contractors Ltd. (“Dhillon”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), of a Determination of the Director of Employment Standards (“the Director”) issued on September 27, 2007 (the “Determination”).
2. Following an investigation, the Delegate of the Director (the “Delegate”) determined that Dhillon had contravened section 6 of the Employment Standards Regulation (the “*Regulation*”) by failing to file with the Director an up-to-date registration and license plate number for the vehicle it used to transport employees. After noting that the appellant had previously been assessed a penalty of \$2500.00 for contravening section 6 of the *Regulation* on August 19, 2005, and that this was the third occurrence within three years, the Delegate imposed a penalty under section 29(1)(c) of the *Regulation* in the amount of \$10,000.00.
3. Dhillon contended that the Delegate failed to observe the principles of natural justice in making the Determination, and that there was new evidence which was not available at the time the Determination was made.
4. Pawan Sachdeva, Accountant filed a letter dated November 6, 2007 with the appeal. In that letter, he indicated that Dalbir Dhillon would like an oral hearing and could more clearly explain everything “*if there is any need.*” The Tribunal may hold any combination of written, electronic and oral hearings. (See Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure). The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

### ISSUES

5. The issues in this case are the following:
  - Did the Delegate fail to observe the principles of natural justice in making the Determination?
  - Should the Determination be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was made?

## THE FACTS

6. According to the Determination, Dhillon is a licensed farm labour contractor under the *Act*. Dhillon was providing contract greenhouse labour to Origino Greenhouse at a worksite located at 17830 16<sup>th</sup> Avenue, Surrey, B.C. on August 31, 2007 when the Employment Standards Branch Agricultural Compliance Team conducted a work site visit.
7. The Agricultural Compliance Team determined that an employee of Dhillon named Hardeep Choongh had used a van with license plate number 307 AVR to transport employees of Dhillon to the Origino Greenhouse that day. It was further determined by the Agricultural Compliance Team that Dhillon had not filed with the Employment Standards Branch an up-to-date registration and license plate number for that van.

## ARGUMENT

### *For the Appellant*

8. Mr. Sachdeva maintained that the van with license number 307 AVR had never been used by Dhillon to transport its employees to a worksite. The van had been located at the Origino Greenhouse because Dalbir Dhillon, a director of Dhillon, had taken the van to the worksite on August 29, 2007, and had left it there because it had broken down.
9. The van in question only had seven seats. A van with fifteen seats including the driver's seat was used to transport eight employees to the worksite. In the appeal response of the Delegate dated November 20, 2007, the Delegate had written that the van in which Mr. Choongh had transported the employees was green. The van with license number 307 AVR was brown in colour, as supported by insurance documents filed with the appellant's reply dated December 10, 2007. All vans used to transport employees were registered with the Employment Standards Branch.
10. There had been a misunderstanding about the evidence Hardeep Choongh. While he was a driver for Dhillon Labour Contractors Ltd, he had never driven the van with license plate number 307 AVR.

### *For the Director*

11. The Delegate submitted that the appellant had been given the opportunity to respond to the allegations, and the arguments made by the appellant had been considered in the Determination.
12. With respect to the new evidence provided with the appeal, the Delegate maintained that the appellant could have provided this evidence during the investigation. The Delegate submitted that the result set out in the Determination would not have been different even if the new evidence had been presented to the Delegate during the course of the investigation.

## ANALYSIS

13. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision 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.

### *1. Did the Delegate fail to observe the principles of natural justice in making the Determination?*

14. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker.
15. The appeal and the documentation submitted on behalf of the appellant do not describe how Dhillon was denied natural justice. The submission focuses on what Mr. Sachdeva submits is an incorrect conclusion by the Delegate.
16. The Delegate for the Director conducted an investigation. Dhillon was given the opportunity to submit any documentation, and reply to the letter dated September 5, 2007 from the Delegate concerning the investigation. The written response of Mr. Dalbir, on behalf of Dhillon was considered by the Delegate. The Delegate noted in the Determination that Dhillon had not submitted any evidence to show that it had filed up-to-date vehicle registration and license papers, as required by the *Regulation*.
17. There was no explanation in the documents filed with the appeal as to why Dhillon had not provided the evidence submitted with the appeal to the Delegate during the course of the investigation.
18. The Delegate noted in the Determination that there was conflicting evidence in the investigation. He considered the assertion of Mr. Dalbir Dhillon that he was driving the vehicle for personal use, and not for transporting farm workers. The Delegate weighed this against the evidence collected during the work site visit by the Agriculture Compliance Team from Hardeep Choongh. Mr. Choongh had told the Agricultural Compliance Team that he was an employee of Dhillon who had driven the van on the day of the worksite visit to transport Dhillon's employees to the Origino Greenhouse. The Delegate provided reasons in the Determination explaining why he preferred the evidence collected on the day of the worksite visit by the Agriculture Compliance Team to the evidence of Mr. Dhillon.
19. Dhillon's appeal is based on its disagreement with the Delegate's findings. There was no evidence to support a finding that Dhillon was denied natural justice. I therefore deny the appeal on this ground.

**2. *Should the Determination be cancelled or referred back to the Director on the basis that there is new evidence which was not available at the time the Determination was being made?***

20. I turn now to the ground for appeal in section 112(1)(c) of the *Act* that there is new evidence which was not available at the time of the Determination. The following documents were filed with the appeal:

- (a) letters dated November 2, 2007 signed by eight employees who had been at the worksite on the day the Agricultural Compliance Team had conducted its site visit;
- (b) a letter dated November 2, 2007 from Manmeet Kaur Sanghera, Supervisor for Origino Greenhouse, in which Ms. Sanghera indicated that Mr. Dhillon had told her that the van was at the worksite because it had broken down;
- (c) a letter from Sukhbir Dhillon confirming that he had driven Dalbir Dhillon home after the van had broken down;
- (d) a letter signed by Hardeep Choongh in which he indicated that he was a driver for Dhillon, but he had never driven the van with plate number 307 AVR. Mr. Choongh further wrote that he had not driven any vehicle on August 31, 2007 for Dhillon. Mr. Dalbir Dhillon had transported eight employees including himself to the worksite in a big white van;
- (e) an invoice dated September 1, 2007 from Clayburn Towing, the company which had towed the van; and
- (f) an invoice dated September 2, 2007 from Blund Auto Repair, which had repaired the van.

21. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, the Tribunal wrote in part as follows at page 3:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

22. On appeal, the Tribunal does not conduct a re-investigation. The Tribunal is being asked by Dhillon in effect, to consider the evidence and arguments of the appellant and reach different conclusions than those reached by the Delegate, when that evidence was not presented to the Delegate prior to the Determination being made. This is not the role of the Tribunal. The appeal must be confined to those grounds listed in subsection 112(1) of the *Act*, as set out above.
23. No explanation was provided as to why the letters and invoices listed above which were provided for the appeal were not submitted to the Delegate during the investigation. In summary, it was not established that the evidence could not, with the exercise of due diligence, have been presented to the Delegate during the investigation of the complaint and prior to the Determination being made. Consequently, I cannot find that Dhillon has satisfied the test set out above in the *Bruce Davies* case for new evidence to be considered with respect to the letters and invoices listed above.
24. I turn now to the new evidence which was submitted on December 10, 2007 with the appellant's final reply. That new evidence pertains to the colour of the van in question. A copy of the owner's certificate of insurance and vehicle license dated March 25, 2007 for the van with license plate number 307 AVR was provided. On the owner's certificate of insurance and vehicle license the colour of the vehicle is listed as "brown".
25. In his letter dated November 20, 2007, the Delegate indicated that Mr. Choongh had made it clear to the Agriculture Compliance Team that he had transported employees of Dhillon to the worksite in a green van, and the only green van at the worksite was the vehicle with license plate number 307 AVR.
26. This new evidence meets the first three conditions set out in the *Bruce Davies* case. Because the colour of the van was not indicated in the Determination and likely was not mentioned to a representative for the appellant prior to the Determination being made, the appellant would not have been aware that there was a requirement for evidence pertaining to the colour of the van. The evidence is also relevant and credible.
27. However, I find that the evidence does not meet the fourth requirement for admitting fresh evidence from the *Bruce Davies* case. The fourth requirement is that the evidence must have high potential probative value. This means that if the Delegate had found that the van was brown in colour, that fact could, on its own, or together with other evidence have led the Director to a different conclusion on the material issue.
28. As part of the Record which was before the Delegate, there is a document dated August 31, 2007 entitled *Farm Site Initial Interview*. This document would have been completed by the Agriculture Compliance Team at the time of the worksite visit. In that document, the vehicle "Make/Model/colour" for the van with license number 307 AVR is listed as "Green Caravan". The license number listed for the vehicle corresponds to the vehicle owned by Mr. Dhillon. I cannot find any explanation on the file as to why the colour would be listed by the Agricultural Compliance team as "green" and on the owner's certificate of insurance and vehicle license as "brown". It is possible that, depending on the shade of green or brown, and the individuals specifying the colour, brown and green could be confused. There is no indication in the Record, in the Determination, or elsewhere in the documentation filed with the appeal that there was any other van at the worksite. The notation on the *Farm Site Initial Interview* lists the license number as 307 AVR together with the colour green.
29. In the Determination, the Delegate found that on the day of the worksite visit, Hardeep Choongh had confirmed with the Agricultural Compliance Team that he was Dhillon's driver, and that he had

transported the farm workers to the Origino Greenhouse in the vehicle in question. The only vehicle referred to in the Determination is the van with license plate number 307 AVR. The Delegate wrote at page 8 of the Determination:

“No contradictory evidence or any doubt surrounded this issue on the day of the Team’s work site visit. Choongh made it clear... that it was Dhillon’s vehicle, he himself was Dhillon’s employee, and he had used the vehicle to transport other Dhillon employees to Origino Greenhouse”.

30. I do not find that the evidence concerning the colour of the van meets the fourth requirement of the *Bruce Davies* case because it could not have led the Director to a different conclusion on the material issue.
31. In summary, because it was not shown that there was a denial of natural justice, or that the Determination should be canceled or sent back to the Director on the basis that there was new evidence, the appeal is dismissed.

## **ORDER**

32. I order pursuant to Section 115 of the Act, that the Determination dated September 27, 2007 is confirmed.

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**Carol Ann Hart**  
**Member**  
**Employment Standards Tribunal**