

An appeal

- by -

Dhillon Labour Contractors Ltd.

- 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: Robert Groves

FILE No.: 2005A/188

DATE OF DECISION: January 9, 2006

DECISION

OVERVIEW

1. This is an appeal by Dhillon Labour Contractors Ltd. (“Dhillon”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on September 21, 2005. In the *Determination*, the *Delegate* found that Dhillon had contravened Section 6 of the *Employment Standards Regulation* (the “*Regulation*”). As Dhillon had previously been found to have contravened Section 6 within the time period stipulated in Section 29(1)(b) of the *Regulation*, the *Delegate* ordered that Dhillon pay an administrative penalty of \$2,500.00.
2. Dhillon filed its appeal with the Tribunal on October 31, 2005. On the same day, the Tribunal wrote to the *Delegate*, requesting that he forward the record considered by him at the time the *Determination* was made, and inviting submissions. On November 17, 2005, the *Delegate* delivered the record to the Tribunal, together with a letter submission (the “*Delegate's Submission*”).
3. On November 23, 2005, the Tribunal invited Dhillon to respond to the *Delegate's Submission*. On December 6, 2005, the Tribunal received a letter submission on behalf of Dhillon, prepared by one Joe Gill CA (the “*Gill Submission*”).
4. On December 8, 2005, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received from the parties.

FACTS

5. Dhillon is a farm labour contractor licensed under the *Act*. On August 19, 2005 the Employment Standards Branch Agricultural Compliance Team (the “*Team*”) conducted a site visit at Gladwin Farms (“*Gladwin*”) in Abbotsford, British Columbia for the purpose of ensuring that the labour contractors providing workers at the site were acting in compliance with the *Act*. Dhillon was one of the labour contractors hired to provide labour at the *Gladwin* site that day. However, Dalbir Dhillon (“*Mr. Dhillon*”), the principal of Dhillon, was not present during the *Team's* visit.
6. Section 6(4) of the *Regulation* says this:
 - (4) *A farm labour contractor must keep at the work site and make available for inspection by the director a daily log that includes*
 - (a) *the name of the worker,*
 - (b) *the name of the employer and work site location to which workers are supplied and the names of the workers who work on that work site on that day,*
 - (c) *the dates worked by each worker,*
 - (d) *the fruit, vegetable, berry or flower crop picked in each day by each worker, and*
 - (e) *the volume or weight picked in each day by each worker.*

7. After arriving at the Gladwin site, the Team requested production of the daily log referred to in Section 6(4). The Determination states that all the Dhillon employees present, as well as two other contractors working on the site, were interviewed by the Team, and were asked for the daily log. No log was produced.
8. The Team then attempted to contact Mr. Dhillon on the telephone number he had provided to the Branch on his license application. There was no answer. The other contractors on site also tried to contact Mr. Dhillon to ask if he had left the daily log with a person on site, again without result.
9. On August 23, 2005, the Branch wrote Dhillon requesting an explanation for the failure to produce the daily log as required. On September 6, 2005, Mr. Dhillon faxed a written response stating that the daily log had been in the possession of one of his drivers who had transported workers to the Gladwin site on August 19, but as the driver had been obliged to take his company vehicle to a garage for repairs, he had left the daily log with a driver employed by another contractor working at the same location. Mr. Dhillon attributed the failure to produce the daily log to the Team's not checking with this "alternative person". He also stated that if the Team had called him that day he would have been able to assist in seeing to it that the log was provided on site.
10. In the Determination, the Delegate rejected Dhillon's explanation, stating that even if the daily log was on site, it was Dhillon's obligation to make it available for inspection by the Team upon request, and there was no duty on the Team to ask for its production from the other contractors present that day, notwithstanding that the Team had, in fact, done so.
11. On these facts, the Delegate concluded that Dhillon had not made the daily log available for inspection, contrary to Section 6(4) of the *Regulation*.
12. The facts relied upon by Dhillon, as set out in its Appeal Form and in the Gill Submission, are in substance no different from those presented to the Delegate in its September 6, 2005 communication, with the exception that Dhillon says Mr. Dhillon received no telephone call from the Team because he was beyond the mobile coverage area at the relevant time, and he left the daily log on site "with some other employee". The Delegate's Submission asserts that this latter statement means that Dhillon has "changed their story", as the initial explanation received from the company was that the log was left with "another contractor's driver". For my part, however, I do not see that the two versions are in substance that different.

ISSUES

13. Can it be said that Dhillon's appeal should succeed for any of the reasons set out in Section 112 of the *Act*, that is:
 - the Delegate erred in law;
 - the Delegate failed to observe the principles of natural justice in making the Determination;
 - evidence has become available that was not available at the time the Determination was being made.

ANALYSIS

14. On its Appeal Form, Dhillon checks boxes stating as its grounds of appeal that, first, the Delegate failed to observe the principles of natural justice in making the Determination and, second, that evidence has become available that was not available at the time the Determination was being made.
15. In my view, neither of these grounds is applicable as a basis for challenging the Determination. Rather, the substance of Dhillon's appeal is that the Delegate erred in law in deciding that it had failed to comply with Section 6(4) of the *Regulation*, given that the daily log was on site and would have been made available for inspection if only the Team had asked the right person for it when the Team visited the Gladwin site on August 19.
16. That being said, the fact that Dhillon has not checked the correct box on its Appeal Form is not dispositive of the outcome in this case. Especially in circumstances where a party is not represented by legal counsel, it is incumbent on the Tribunal to consider the record and determine whether the particular form of challenge to a determination invokes, *prima facie*, one of the statutory grounds of appeal. If it does, the Tribunal should not dismiss an appeal merely because an appellant has not properly characterized it with the appropriate check mark in the right box (see *Triple S Transmission Inc.* BCEST #D141/03).
17. In the instant case, I see no injustice in my proceeding to consider the merits of Dhillon's appeal, notwithstanding it is based on an alleged error of law, a ground that was not specifically identified in its Appeal Form.
18. It has been emphasized in previous decisions of the Tribunal that the daily log is an important tool for ensuring that workers employed as contract labour in the agricultural sector receive the benefit of the minimum standards contained in the *Act*. If the Agricultural Compliance Team cannot gain access to the contractor's daily log, that legislative goal is, at the very least, undermined (see *BSA Enterprises Ltd.* BCEST #D098/04).
19. Here, the undisputed facts are that the Team attended at the Gladwin site and requested access to Dhillon's daily log, as the legislation entitled it to do. Indeed, the Delegate asserts in the Determination, in a statement that is not disputed by Dhillon, that the Team asked not only all the Dhillon employees, but also two other contractors working on the site, for production of the log. However, no daily log was produced.
20. The fact that the Team might have gained access to the log if it had been able to contact Mr. Dhillon, or if his driver had not attended at the garage to effect repairs to the company vehicle, is, in my opinion, entirely irrelevant to the proper result on this appeal. The language of Section 6(4) of the *Regulation* makes it clear that it is the farm labour contractor's responsibility to make the daily log available for inspection. It is not the Team's responsibility to seek it out.
21. The reason why Dhillon found itself in breach of Section 6(4) has nothing to do with the efforts of the Team to locate the log, and has everything to do with the fact that the representatives of Dhillon, in this case Mr. Dhillon, and his driver, who can be said to have been responsible for making the log available, were not on site at the relevant time. As the Tribunal has pointed out before, the absence of a representative of the contractor, even if it is only temporary, is no excuse for a failure to produce the daily log (see *Jagir Enterprises Ltd.* BCEST #D191/05). This circumstance was compounded by the fact that

the driver does not even appear to have left the log with a Dhillon employee. Instead, it was left with an employee of another contractor. One may assume that the driver had good reason to choose this particular custodian of the log, but having made that choice it is Dhillon that must bear the responsibility for the fact that the log was not produced when access to it was requested.

ORDER

22. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed.



Robert Groves
Member
Employment Standards Tribunal