

An appeal

- by -

PMK Dhaliwal Enterprises Limited  
(the “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* (as amended)

**TRIBUNAL MEMBER:** Yuki Matsuno

**FILE No.:** 2007A/154

**DATE OF DECISION:** February 21, 2008

## DECISION

### SUBMISSIONS

Mandeep Dhaliwal

for the Employer

Reena Grewal

for the Director of Employment Standards

### OVERVIEW AND BACKGROUND

1. PMK Dhaliwal Enterprises Limited appeals a Determination of the Director of Employment Standards (the “Director”) dated October 29, 2007 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. A delegate of the Director (the “Delegate”) found in the Determination that the Employer had contravened section 6(4) of the *Employment Standards Regulation* (the “Regulation”) by failing to keep a daily log at the work site and make the log available for inspection.
3. Section 6(4) of the *Regulation* provides:
  - 6.(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 each 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.
4. The Determination arose out of events that occurred on October 11, 2007. On that day, the Employment Standards Branch Agricultural Compliance Team (the “Team”) conducted worksite visits at two farms, AR Savage & Sons and Jagbar Farms, both located in Richmond, B.C. The Employer, a licensed farm labour contractor under the *Act*, was supplying contract labour to both farms for harvesting cranberries. The purpose of such visits by the Team generally is to ensure that farm labour contractors are in compliance with the *Act* and *Regulations*.
5. According to the Determination, the owner of the Employer was not present at either worksite. At both farms, the members of Team interviewed the Employer’s workers. None of the Employer’s employees on either worksite produced a daily log for inspection by the Team, in spite of the Team’s inquiries. The Delegate then sent the Employer a letter dated October 12, 2007 inviting the Employer to respond to its initial view that the Employer contravened section 6(4) of the *Regulation* by failing to make a daily log available for inspection. The Employer responded in writing on October 22, 2007, indicating that the daily log was available at the main office of the farm[s] where the employees were working; that the log sheet was not with the workers because they were working in water; that the Team usually phones the Employer to confirm where the daily log is located; and that a representative of the Employer (unnamed)

phoned the Employment Standards office to let the Team know about the daily log, received no answer, and left a message.

6. The Delegate subsequently issued the Determination. In her reasons, the Delegate found that the Employer's response did not deny that the daily logs were not made available for inspection by the Director; rather, they explain and provide reasons why they were not made available. The Delegate points out that it is the responsibility of the employer to provide the daily log for inspection; it is not the Team's responsibility to seek out the log. The Delegate imposed an administrative penalty of \$2,500.00 on the Employer, pursuant to section 29 of the *Regulation*. This was the Employer's second contravention of section 6 of the *Regulation* within three years.
7. The Employer now appeals the Determination on the ground that the Director, represented by the Delegate, failed to observe the principles of natural justice in making the Determination. The Employer's submissions also indicate that two other grounds of appeal may apply. There is a suggestion that the Delegate erred in law in determining that the Employer failed to comply with section 6(4) of the *Regulation*, because the log was in the farm office at both worksites. Also, The Employer's submissions contain evidence that was not previously presented to the Delegate, which could be the basis for arguing that evidence has become available that was not available at the time the Determination was being made. Although the Employer did not check these two grounds of appeal in its appeal form, I will proceed to consider the merits of its appeal on these grounds as well as the enumerated ground of failure to observe the principles of natural justice. The Tribunal should not take a mechanical approach to appeals relying solely on the grounds of appeal that are checked off on the appeal form; rather, it should take a large and liberal view of the appellant's explanation as to why the determination should be cancelled, varied or referred back to the Director: *Triple S. Transmission Inc.*, BCEST #D141/03.
8. I will decide this case on the basis of the written documentation before me: the submissions of the parties, the Determination, and the Record. The Employer did not request an oral hearing and there appears to be no need for an oral hearing, given that credibility is not an issue.

## **ISSUES**

9. Did the Director of Employment Standards fail to observe the principles of natural justice in making the Determination?
10. Did the Director of Employment Standards err in law in making the Determination?
11. Has evidence become available that was not available at the time the Determination was being made?

## **ARGUMENT AND ANALYSIS**

### ***Natural Justice***

12. The basic components of the principles of natural justice are: the right to know the case against oneself and respond; the right to an unbiased decision maker who both hears and decides the case; and the right to receive reasons for the decision. In my view, none of the Employer's arguments point to a failure to observe the principles of natural justice. The Employer was given the information about the case against it

and had an opportunity to respond, and there is no assertion, much less evidence, that there was bias on the part of the Delegate. Further, the Delegate provided reasons for her decision in the Determination.

### ***Error of Law***

13. An error of law may be found in the following (see *Britco Structures Ltd.*, BC EST #D260/03):
  1. a misinterpretation or misapplication of a section of the *Act*;
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).
14. The Employer may be taken to argue that the Delegate misinterpreted or misapplied section 6 of the *Regulation*. It submits that the daily logs were at the farmer's office and no Employment Standards officials contacted the farmer or Mandeep Dhaliwal, the owner of the Employer, at the time of inspection. The Employer implies that there was an onus on the Team to make inquiries of the farmer or of the owner, who was not at the work site.
15. The Delegate says regardless of where the daily log was, it was not produced for inspection when the Team asked for it. The Delegate argues that it is not the Team's responsibility to seek out the log; rather, it is the employer's responsibility to produce the daily log. The Delegate refers to the Tribunal's decision in *Dhillon Labour Contractors Ltd.*, BCEST #D005/06 at paragraph 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 diver 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.
16. In fact, the Team visited both farms and interviewed employees at both farms to inquire after the daily log. In addition, there is evidence in the record that at Jagbar Farms, the Team interviewed Kal Mahal, who is indicated to be a "supervisor" and at AR Savage & Sons, the Team interviewed Malkit S. Sidhu, who is also indicated to be a "supervisor". It is unclear from the record whether they are supervisors amongst the employees, or supervisors working for the farm. Nevertheless, neither of these people, nor the employees, produced the daily log at the Team's request.
17. The fact that the Team may have gained access to the log if it had contacted the farmer or the owner is irrelevant to the correctness of the Determination; it is not the Team's responsibility to seek out the daily log: *Dhillon Labour Contractors*, *supra*. In order to comply with section 6(4) of the *Act*, the farm labour contractor has the responsibility to make the log available for inspection upon request. The method by which it does this is up to each contractor, since it is an employer's responsibility to structure its affairs to

ensure that it complies with the Act: *478125 B.C. Ltd.*, BCEST #D279/98. As the Tribunal held in *BSA Enterprises Ltd.*, BCEST 2004A/21:

The daily log is an important tool in ensuring workers have the minimum standards in their employment which the Legislature established in the Act. Without access to the daily log, the Compliance Team was no doubt hindered in its ability to ensure these minimum protections were in place for [the farm contractor's] employees on this date.

18. I find that the Delegate made no error of law in making the Determination.

### *New Evidence*

19. A Determination is made on the evidence gathered during the investigation of the alleged breach of the Act or Regulations. However, sometimes evidence becomes available that was not available at the time the Determination was being made. In that case, a person may appeal a Determination on that ground. Before the Tribunal will consider that new evidence, all of the following four conditions must be met:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high 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.

*(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03).*

20. In this case, the Employer attached several pieces of “new” evidence to its submissions:

1. A letter dated December 4, 2007, signed by Jang Singh Dhaliwal, indicating that he is the supervisor of AR Savage & Sons, indicating that he had the daily log in the office on the day of the site visit and no one from the Employment Standards Branch contacted him to ask for the log;
2. A letter dated December 4, 2007, signed by Nasib Sidhu for Jagbar Farms, indicating that he was at the farm on the day of the site visit and no one from the Employment Standards Branch asked him for the daily log, which was available in his office; and
3. A letter dated January 20, 2008 signed by Kal Mahal, Mahal Farms, indicating that on October 11, 2007 he was visiting his neighbour's farm, Jagbar Farms, and the Team asked him about the daily log. He told them it should be in the office, because he did not know the [actual] whereabouts of the log. (This evidence contradicts the evidence in the record indicating Mr. Mahal was a supervisor on site at Jagbar Farms).

21. In addition, in its reply submission dated January 20, 2008, the Employer also indicated that Mr. Malkiat [*sic*] Singh Sidhu could not be reached because he was out of the country, but stated that Mr. Sidhu was not the supervisor, at AR Savage & Sons; rather, he was a worker there.
22. None of this evidence passes the test for new evidence to be accepted by the Tribunal. It appears that all of this evidence could have been presented to the Delegate during the investigation, prior to the Determination being made. There is no explanation to the contrary. In addition, the evidence does not have sufficient probative value to have led the Director to a different conclusion on a material issue. Regardless of whether the daily logs were present in the farm offices, the logs were not made available for inspection when the Team made the worksite visits and requested them. With respect to Jagbar Farms in particular, Mr. Mahal says he told the Team that the log was in the office, but this appears to be a speculative remark and was not based on actual knowledge. In any event, neither Mr. Mahal nor any other person to whom the Team spoke produced the daily logs, at either farm. I decline to accept and consider this evidence.
23. The Employer has failed to show that the Determination should be cancelled. I dismiss the appeal.

## **ORDER**

24. Pursuant to Section 115 of the *Act*, I order that the Determination dated October 29, 2007 be confirmed.

---

**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**