

An appeal

- by -

J M S Labour Supply Ltd.
("JMS")

- 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 L. Roberts

FILE No.: 2010A/14

DATE OF DECISION: March 29, 2010

DECISION

SUBMISSIONS

Sukhjot Sandhar on behalf of J M S Labour Supply Ltd.
Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Sukhjot Sandhar, on behalf of J M S Labour Supply Ltd. ("JMS"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 17, 2009.
2. JMS Labour Supply Ltd. is a licensed farm contractor. As a condition of licensing, principals of JMS received education and information on the *Act* and the *Employment Standards Regulation* (the "*Regulation*") as they applied to farm labour contractors. On November 3, 2009, as part of a regular compliance audit, a delegate of the Director issued a demand for records, including payroll records, cancelled cheques and daily logs. The records were to be provided to the Employment Standards Branch office by November 17, 2009.
3. On November 17, 2009, Mr. Sandhar contacted the Branch office and advised that he had left the required records in one of JMS's vehicles, which he had then taken in for repairs. Mr. Sandhar advised the Branch that when he picked the vehicle up from the shop, the records were gone. Mr. Sandhar was advised to try to locate the records.
4. The delegate did not receive any records from JMS. On December 17, 2009, the delegate issued a Determination finding JMS in contravention of s. 28 of the *Act* for failing to retain payroll records for two years and section 6 of the *Regulation* for failing to keep daily log records for each day worked by each employee for two years as required. The delegate imposed a \$500 administrative penalty for JMS's contravention of section 28 of the *Act*. The delegate found that JMS had two prior contraventions of section 6 of the *Regulation*, on April 17, 2008 and November 24, 2008. Accordingly, the delegate imposed a \$10,000 administrative penalty for the third contravention. The Determination was sent to JMS on December 17, 2009, along with a notice to Directors and Officers that if any findings against the Company were disputed, the Company had to appeal the Determination within the appeal period, which was January 25, 2010.
5. Although Mr. Sandhar's appeal was filed on January 27, 2010, the delegate advised the Tribunal that the Director did not object to the late acceptance of the appeal.
6. Mr. Sandhar alleges that new evidence has become available that was not available at the time the Determination was made.
7. I have determined that the matter can be adjudicated based on the written submissions of the parties.

ISSUE

8. Is there new evidence available that was not available at the time the Determination was issued that would cause the delegate to arrive at a different conclusion on a material issue?

ARGUMENT

9. Mr. Sandhar submits that he was not a director of JMS until May 6, 2009. He states that he assumed the position of full time manager as of May 7, 2009, and believed that, up to that time, the company had been properly managed. He says that it was only after he took over responsibility for JMS management that he became aware that “all [was] not well”. He states that, given reasonable time, he could produce the payroll records and bank statements for the time period requested. He also seeks to have the contravention considered as the first one, given that it was the first one when the company was under his supervision and to have the minimum penalty imposed.
10. The delegate argues that JMS’s submission does not address the central issue of whether or not JMS had the required records. He says that during the investigation, Mr. Sandhar advised the delegate that the required records had gone missing. The delegate submits that because JMS is not disputing the facts, the appeal should be dismissed.

ANALYSIS

11. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
12. The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.
13. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
 - 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
14. I am not persuaded that the appeal has merit.
15. The appeal submission fails to provide any new evidence other than to state that Mr. Sandhar was not “managing” the company at the relevant time. Mr. Sandhar’s status as a director of JMS is irrelevant to the issue on appeal. It was Mr. Sandhar who contacted the Branch to advise the delegate that JMS was unable to provide the required records. It is only in the appeal submission on January 24, 2010, that Mr. Sandhar states that, given reasonable time, he can produce the required documents. There is no evidence Mr. Sandhar requested an extension to obtain the records when the records were allegedly lost. Mr. Sandhar ought to have provided those documents in the first instance as it is clear, based on Mr. Sandhar’s submission, they were available with the exercise of due diligence.

16. Mr. Sandhar also seeks to have the penalty reduced from \$10,000 to \$500 on the grounds that this was the first contravention under his “management” of the company. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by the *Regulation*. I find no error in the delegate’s conclusion and dismiss the appeal.
17. The appeal is dismissed.

ORDER

18. I Order, pursuant to Section 115 of the *Act*, that the Determination dated December 17, 2009, be confirmed in the amount of \$10,500, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal