

An appeal

- by -

Mahla Nursery & Farm Ltd.
("Mahla")

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/064

DATE OF DECISION: July 15, 2009

DECISION

SUBMISSIONS

Daljit Dhanoa	on behalf of Mahla
Sukhi Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

- ¹ This is an appeal by Mahla pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 9, 2009. In that decision, the Director ordered Mahla to pay the administrative penalty of \$500 under section 29 of the *Employment Standards Regulation* (the “Regulation”) for contravention of section 46 of the *Regulation*.
- The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective positions.
- Daljit Dhanoa (“Dhanoa”) on behalf of Mahla on Appeal Form 1 has appealed the Determination of the Director on the grounds that evidence has become available that was not available at the time the Determination was made. He submitted that the owner of Mahla, Mrs. Brar, was in the hospital for eye surgery on March 26 and on April 2, 2009 and that all the requested documents were provided to Director on April 14, 2009. Implied in this submission is that the Director failed to observe the principles of natural justice in ordering a penalty in these circumstance.¹

ISSUE

- The issues to be determined by the Tribunal are as follows:
 - Is the evidence that Dhanoa tendered, evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director?
 - Did the Director fail to observe the principles of natural justice in making the Determination?

BACKGROUND

- Mahla is a licenced farm labour contractor which was issued a licence for the term of November 23, 2007 to November 23, 2010. On March 16, 2009 a Demand for Employer Records was issued to Mahla pursuant to section 85(1) of the *Act* for payroll records, including bank statements, cancelled cheques and payroll summaries regarding all employees to be delivered on or before March 30, 2009 so that the Employment Standards Branch could conduct a routine audit. On March 31, 2009, Dhanoa, an accountant, left a message for Sukhi Dhaliwal, an Employment Standards Officer, that he wanted to speak to her regarding the Demand

¹ Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST # D141/03

and delivery of payroll records. On April 1, 2009, Sukhi Dhaliwal returned the phone call but Dhanoa was unavailable but the receptionist said that Dhanoa would phone back as soon as possible. As at the date of the Determination, April 9, 2009, the phone call was not returned and no records were delivered to the Branch.

6. In submissions dated May 19, 2009, Dhanoa states that the owner, Mrs. Brar, was in the hospital for eye surgery on March 26, 2009 and on April 2, 2009 and that the documents were provided to the Employment Standards Branch on April 14, 2009.

ANALYSIS

7. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):

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 made.

8. Dhanoa on behalf of Mahla has appealed on ground (c). In his submissions he has also referred to the fact that the owner of Mahla was in hospital on the two days of March 26 and April 2 which could imply that there were some natural justice factors not observed. I will deal with ground (c) first; that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I so find, then such evidence can be used in my analysis on the remaining implied ground (b).

1. New Evidence

9. In *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for “new evidence”:

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.

- ^{10.} I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to accept the newly tendered evidence.
- ^{11.} The evidence tendered by Mahla as new evidence, that is, the information on the Appeal Form dated May 19, 2009, was submitted after the date of the Determination. There was no explanation given by Dhanoa why such evidence, that is, that the owner was having eye surgery on March 26, 2009 and on April 2, 2009 was not available before the rendering of the Determination. Accordingly I find that on this count, this new evidence fails to meet a condition for the admission of new evidence and accordingly cannot be considered. Furthermore, even if I did consider the substance of this evidence, I take note that this evidence is not corroborated by any medical documentation or evidence from Mrs. Brar, the owner, to indicate that she was incapacitated before and after the surgery on March 26 such that she could not give instructions to Dhanoa, the accountant, to forward the information requested to the Branch. There is no allegation that Mrs. Brar did not receive the Demand for Employer Records. There is also no explanation why Dhanoa did not phone the Branch before the deadline for the employer records submission and no explanation why Dhanoa did not return the call of Sukhi Dhaliwal made to him on April 1, 2009.

2. Failure to Observe Principles of Natural Justice

- ^{12.} Natural justice requires that a party has an opportunity to know the case against him or her, and it includes the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.
- ^{13.} I have reviewed the submissions of Dhanoa and find no evidence of such a breach of natural justice. There is no evidence that Dhanoa on behalf of Mahla has been denied a chance to defend this case in a fair manner.

ORDER

- ^{14.} Pursuant to section 115 of the *Act*, I order that the Determination dated April 9, 2009 be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal