Employment Standards TRIBUNAL

An appeal

- by -

M KANJ Construction Ltd.
(the "Appellant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2013A/56

DATE OF DECISION: October 7, 2013

DECISION

SUBMISSIONS

Ronnie Gill on behalf of M KANJ Construction Ltd.

INTRODUCTION

1. This appeal concerns a Determination issued on July 5, 2013, against M KANJ Construction (the "Appellant") pursuant to which the Director of Employment Standards, through her delegate (the "delegate"), levied two separate $500 monetary penalties against the Appellant under section 98 of the *Employment Standards Act* (the "*Act*"). There are two issues before me in this appeal. The first issue concerns the timeliness of the appeal and the second issue, the adjudication of which hinges on my decision regarding the first issue, is whether the appeal should be dismissed as having no reasonable prospect of success (see *Act*, subsections 109(1)(b) and 114(1)(f)).

2. At this juncture, I am adjudicating this appeal based on the submissions filed by the Appellant; however, in addition, I have also reviewed the subsection 112(5) record that was before the Director when the Determination was being issued.

BACKGROUND FACTS

3. The Appellant is a farm labour contractor licensed under section 13 of the *Act* and section 5 of the *Employment Standards Regulation* (the "*Regulation*"). According to the information set out in the delegate's "Reasons for the Determination" (issued contemporaneously with the Determination), on May 28, 2013, representatives from the Employment Standards Branch's Agricultural Compliance Team conducted a worksite visit and inspection at an Abbotsford farm. During the course of the visit, it was determined that the Appellant was using three separate vehicles to transport its workers to the farm. Members of the team inspected these vehicles and determined that there were no "vehicle safety notices" posted in any of the vehicles.

4. On June 5, 2013, the delegate wrote a letter to the Appellant summarizing the team's findings regarding two possible regulatory contraventions, namely, subsections 6(1)(f) and 6.1. The former provision states that a farm labour contractor must file certain information with the Director relating to all vehicles used to transport farm workers (including vehicle registration and licence plate numbers). The latter provision states, in part, that a farm labour contractor must post in all vehicles used to transport farm workers "a notice provided by the director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers Compensation Act*, including driver, seating and seat belt requirements". This notice "must be displayed in one or more positions in the vehicle that are clearly visible to the driver or operator of the vehicle and employees riding in the vehicle".

5. The delegate's letter indicated that it did not have any current registration information on file regarding three particular vehicles and, in addition, noted that members of the team were unable to find the requisite safety notices in any of the vehicles. The delegate indicated that he was considering issuing monetary penalties regarding these two apparent contraventions but asked the Appellant, if it disagreed with the preliminary findings, to "please provide the Delegate of the Director all documents on which you rely to support your position ... no later than June 19, 2013".

6. The Appellant responded to the delegate's request, after having been granted an extension, on June 24, 2013. The Appellant's somewhat indirect response related to the question regarding two of its vehicles (but not the third) and did not in any fashion address the "safety notice" issue.

7. The delegate determined that the evidence clearly showed that the Appellant contravened both subsections 6(1)(f) and 6.1 of the *Regulation* and, accordingly, issued the Determination. The Determination contains, at the bottom of the second (and last) page, a text box entitled "Appeal Information" containing information about appealing the Determination and further stating that the deadline for filing an appeal with the Tribunal is 4:30 pm on August 12, 2013. The material before me shows that the Appellant waited until the very last minute – quite literally – to file its appeal. The Appellant attempted to fax its appeal documents to the Tribunal at 4:28 PM and again at 4:29 PM on August 12, 2013, but in both instances the documents were not successfully transmitted (the Appellant's fax record indentifies the transmission failure as a "Comm. Error" which I take to mean "communication error"). In any event, a third attempt was made at 4:36 PM and the Tribunal's fax records indicate that this transmission was received at 4:37 PM. Thus, at least in a strict technical sense, this appeal was filed after the appeal period expired (see Tribunal *Rules of Practice and Procedure*, Rule 15(10)).

8. The Appellant is not appealing the $500 monetary penalty relating to the vehicle registration information (*Regulation*, subsection 6(1)(f)) stating "we accept the penalty". However, the Appellant says that the $500 monetary penalty relating to its failure to post "safety notices" in its vehicles should be rescinded. The Appellant's position regarding this latter penalty could not be more straight-forward – it says that there *were* notices in the vehicles and that they were affixed to "the ceiling of the van so that the passengers notice it the minute they enter and one on the driver's door panel which the driver notices immediately upon opening the vehicle door". The Appellant's appeal is based on subsections 112(1)(b) and (c) of the *Act* – the delegate failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available when the Determination was being made.

FINDINGS AND ANALYSIS

9. As noted above, there are two matters that I must address, first, whether the appeal period should be extended and, second, if the appeal period is extended, whether the appeal should be dismissed in any event because it has no reasonable prospect of success. I first turn to the timeliness of the appeal.

The application to extend the appeal period

10. The deadline for filing an appeal, as set out in the Determination, was apparently calculated in accordance with subsections 122(1)(b) and (2) of the *Act* (deemed service by registered mail) although there is nothing in the record before me indicating that the Determination was actually served on the Appellant by registered mail. In any event, the Appellant is not saying that it did not receive the Determination by registered mail; rather, it says that it attempted to file a timely appeal but was frustrated by technology-related problems. The record before me does not enable me to determine if the "communication failure" was attributable to the Appellant's hardware or that of the Tribunal. In any event, the Tribunal's records show that the Appellant's appeal materials were received, by fax, at 4:37 PM on August 12, 2013 – seven minutes late. By rule, the Appellant's appeal documents were deemed to have been filed on August 13, 2013 – one day late. However, I am satisfied that the Appellant made a *bona fide* effort to file a timely appeal and that no party can seriously claim prejudice by reason of a seven minute delay. It may be the case that the appeal documents were not delivered in time due to a problem with the Tribunal's, rather than the Appellant's, equipment. In all the circumstances, I think it only fair and just to extend the appeal period under subsection 109(1)(b) of the *Act* to August 13, 2013.

11. I now turn to the second issue before me, namely, whether the appeal should be dismissed as having no reasonable prospect of success.

No Reasonable Prospect That The Appeal Will Succeed

12. As noted above, the Appellant has grounded its appeal on two separate assertions, first, that the delegate failed to observe the principles of natural justice in making the Determination and, second, that is now has evidence that was not available when the Determination was being made. The Appellant separately addressed each ground of appeal in a memorandum appended to its Appeal Form. I have extracted the relevant assertions from its material, below.

13. With respect to the "natural justice" ground, the Appellant says that no one from the Agricultural Compliance Team ever inspected any of the three vehicles in question and that no one representing the Appellant was ever requested to indicate to members of the team where the "safety notices" could be found inside the vehicles. The Appellant says that the safety notices were in place as required by section 6.1 of the *Regulation*.

14. The Appellant's "new evidence" consists of the following:

> The person representing [the Appellant] is more than willing to testify that at no time did the Team request to see such "Safety Notice" nor mentioned the "Safety Notice" nor entered the vehicles at any time. They only requested the insurance documentation.
>
> We will provide affidavits from the Employees at the time of this inspection to prove that the Safety Notices were clearly posted and visible to the driver and employees. Please note they think they are "Seatbelt Notices". [*Note*: the Appellant then states that it "should" be able to provide these affidavits by August 30, 2013, but so, far as I am aware, these affidavits have never been filed with the Tribunal].

15. However, at a later point in its memorandum, the Appellant concedes "no new evidence is available" but says that it now wishes to argue points that it inadvertently failed to raise with the delegate prior to the Determination being issued.

16. The Appellant's principal "natural justice" argument is one that is grounded in a simple factual assertion, namely, that the "safety notices" were in place in all three vehicles and that if members of the Agriculture Compliance Team had only looked, the notices were there to be seen. This factual assertion, of course, stands in marked contrast to the factual findings set out in the delegate's reasons and, in particular, the delegate's finding that "The Team searched the three vehicles for the vehicle safety notice but found that it was not posted in any of the three vehicles" (page 7). Not having been at the inspection, and in the absence of any sort of video record of the inspection, I am not in a position to resolve this factual discrepancy. I should note, however, that the Team's "inspection report" prepared at the worksite on the day in question – and thus is a contemporaneous record – indicates that none of the vehicles had a section 6.1 notice: "None of M KANJ vehicles registered or have 6.1 notice". This record certainly could be taken as corroboration of the factual findings set out in the delegate's reasons.

17. It should also be noted that the Appellant says that the Determination should be cancelled based on a failure to observe the principles of natural justice. One of the fundamental components of natural justice is the precept that parties should be given a fair and reasonable opportunity to know – and respond to – allegations made against them. The delegate's June 5, 2013, letter to the Appellant could not have been clearer – the delegate set out the nature of the Director's preliminary findings and specifically requested the Appellant to provide a written response. The Appellant wholly failed to respond to the allegation relating to the safety

notices – in effect, the evidence against it on this score stood completely uncontroverted and thus it is hardly surprising the delegate levied the $500 monetary penalty in question. I fail to see how it can be said that the delegate failed to observe the principles of natural justice when it detailed the nature of the evidence against the Appellant and invited the Appellant to provide a substantive response. In my view, the Appellant's failure to respond does not constitute a failure *by the delegate* to observe the principles of natural justice.

18. With respect to the Appellant's "new evidence", as noted above, the Appellant concedes that this is not "new evidence" at all – at least in the sense that it was not available when the Determination was being made. This particular ground of appeal was at issue in *Davies et al.*, BC EST # D171/03, where the Tribunal enumerated a series to factors that should be considered when "new evidence" is tendered on appeal:

> (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.

19. In my view, the Appellant's new "evidence" – if one can even characterize it as such since it consists of hearsay assertions completely unsupported by any corroboration – is not admissible on appeal. The Appellant's evidence could have been provided to the delegate; indeed, the Appellant was specifically invited to provide evidence by way of the delegate's June 5, 2013, letter but it failed to do so. Although the assertions made by the Appellant in its appeal documents are relevant, they are not credible. As matters now stand, the Appellant's "new evidence" is simply a series of hearsay statements and the corroborating affidavits that the Appellant said it would submit have never been filed. Accordingly, these statements have little, if any, probative value.

20. Taking the foregoing considerations into account, although I would grant an extension of the appeal period, that decision is effectively moot since, in my opinion, this appeal must be dismissed under subsection 114(1)(f) of the *Act* because there is no reasonable prospect that the appeal will succeed.

ORDER

21. Pursuant to subsection 109(1)(b) of the *Act*, the appeal period in this matter is extended to August 13, 2013, and thus this appeal is properly before the Tribunal. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed in its entirety and in accordance with subsection 115(1)(a) of the *Act* the Determination is confirmed as issued in the amount of $1,000.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal