

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.: 2006A/81

DATE OF DECISION: September 20, 2006

DECISION

SUBMISSIONS

Dalbir Dhillon on behalf of Dhillon Labour Contractors Ltd.
Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. In this appeal Dhillon Labour Contractors Ltd. ("Dhillon") challenges a determination dated May 15, 2006 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which Dhillon was found to have contravened two provisions of the *Act*, namely:
 - Section 17 – employees not paid all wages earned in each pay period at least semi-monthly and within eight days of the end of the pay period;
 - Section 28 – failure to keep payroll records concerning some employees.
2. In the result, the Delegate decided that two administrative penalties of \$500.00 each should be imposed, for a total of \$1,000.00, pursuant to Section 29 of the *Employment Standards Regulation* (the "*Regulation*").
3. I have before me Dhillon's Appeal Form and attached submission, the record produced by the Delegate and his submission, the Determination, and the Reasons for the Determination.
4. The Tribunal has determined that the appeal will be decided on the basis of the written materials received, and without an oral hearing

FACTS

5. Dhillon is a farm labour contractor registered under the *Act*.
6. On June 23, 2005 and August 19, 2005 the Employment Standards Branch Agricultural Compliance Team (the "Team") conducted site visits at farms in the Abbotsford area where workers supplied by Dhillon were picking berries. Several of the persons found to be working there were interviewed, and interview sheets prepared.
7. On October 31, 2005 the Delegate issued a Demand for Records pursuant to section 85(1)(f) of the *Act* and directed it to Dhillon. The Demand required that Dhillon produce to the Delegate for inspection its payroll records, bank statements, cancelled cheques, daily logs and direct deposit information in respect of its employees (the "Records"). Dhillon complied with the Demand.
8. A review of the Records indicated to the Delegate that at least some of Dhillon's employees were not paid all wages earned in each pay period at least semi-monthly and within eight days of the end of the pay period. Instead, the employees were paid monthly.

9. In addition, the Delegate compared Dhillon's Records with the interview sheets completed by the Team during the site visits the previous summer. He concluded that there were several persons working for Dhillon at that time in respect of whom Dhillon had kept no Records.
10. On April 10, 2006 the Delegate wrote to Dhillon offering an opportunity to the company to respond to the observations the Delegate had made in reviewing the Records. Dhillon responded in writing later that month.
11. The Reasons for the Determination say that on the payday issue Dhillon stated that it paid some employees monthly, rather than semi-monthly, because the employees had not provided particulars of their bank accounts into which their wages could be deposited when the earlier payday arrived.
12. The Reasons for the Determination say that on the issue of Dhillon's not keeping payroll records in respect of some of its employees, the persons in question were not employees of Dhillon.
13. After reviewing Dhillon's submissions, and the evidentiary record, the Delegate concluded that Dhillon had contravened the *Act* in the manner indicated above.

ISSUES

14. Can it be said that Dhillon has established grounds entitling the Tribunal to vary or cancel the Determination, or refer the matter back to the Director for consideration afresh?

ANALYSIS

The proper grounds of appeal

15. The grounds for challenging a determination by way of appeal to the Tribunal are set out in section 112 of the *Act*, as follows:
 - 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 being made.*
16. Here, Dhillon's Appeal Form indicates that it wants the Determination to be cancelled, or the matter referred back to the Director, because the Director failed to observe the principles of natural justice.
17. In general, such a challenge gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04).

18. In the context of proceedings under the *Act*, the obligation to observe the principles of natural justice is informed by the language of section 77, which reads:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

19. The difficulty I have with Dhillon's plea is that there is nothing in the record, or the submissions delivered by the parties on this appeal, which would suggest that Dhillon was ignorant of the Delegate's concerns, or was somehow deprived of the opportunity to make representations which would set things right. The issues of late payment of wages, and the failure to keep payroll records concerning certain employees, were the very issues the Delegate says he addressed with Dhillon in his letter to the company sent April 10, 2006. The Reasons for the Determination say that Dhillon responded in writing with explanations concerning these areas of concern. Those explanations must have been considered by the Delegate because he refers to them in his Determination. They also mirror the substance of the submissions made by Dhillon on this appeal. Finally, there is no suggestion that the Delegate relied on other evidence of which Dhillon was unaware when making the Determination.

20. There is, in short, no substance to the assertion that the Delegate acted in breach of the principles of natural justice.

21. It frequently occurs that appellants tick the wrong box when completing the Appeal Form that must be submitted to the Tribunal. Many appellants do not retain lawyers. The grounds of appeal set out in section 112 contain legal terms of art. For most lay persons, their precise meaning must be a mystery. It is at least in part for this reason that the Tribunal will seek to discern the true basis for a challenge to a determination, in order to do justice to the parties, regardless of the particular box an appellant has checked off on the Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03).

22. In my opinion, this appeal raises a question of law, not issues concerning the rules of natural justice. This is so because it is not the process itself of which Dhillon complains, but rather the fact that the Delegate did not accept the explanations given by Dhillon in response to the matters of concern the Delegate had raised. The question of law Dhillon poses is whether its explanations for the late payment of wages, and the failure to keep proper payroll records, are sufficient in law to warrant my deciding that the Determination should be varied or cancelled, or the matter referred back to the Director for consideration afresh.

Late payment of wages

23. The Delegate's investigation revealed that Dhillon had contravened section 17(1) of the *Act*, which reads:

17.(1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

24. Because the employees in question in this case were farm workers, section 40.2 of the *Regulation* is also germane. It reads:

- 40.2 (1) *In respect of the payment of wages to farm workers, farm labour contractors are excluded from section 20 of the Act.*
- (2) *A farm labour contractor must pay all wages to farm workers employed by the farm labour contractor*
- a) *in Canadian dollars, and*
 - b) *by deposit to the credit of the farm worker's account in a savings institution.*

25. For the purposes of this discussion, the term "savings institution" is defined in section 29 of the *Interpretation Act* to mean, *inter alia*, a bank, credit union, or trust company.

26. Dhillon admits that it paid certain of its employees late. It says that this sometimes occurred with new employees who did not provide particulars of the bank account into which their wages were to be paid in time for the making of the direct deposit. Dhillon explains that when this occurred it reserved the requisite amounts in its account "ready to go" until the bank particulars were provided. It asserts that it never intended to pay wages late, and but for the requirement that wages be paid by way of direct deposit to the credit of workers' accounts in a savings institution it would have paid on time, by way of cheques delivered directly to the employees in question. It argues that it effectively had no choice but to withhold wages when proper bank information was not provided, and that it should not be penalized due to the "ignorance of employees".

27. Dhillon's argument misconstrues entirely its obligations under the *Act*. In *JKJ Contracting Ltd.* BCEST #D201/04 the Tribunal considered the purpose of the legislative provisions affecting farm labour contractors, and said this:

A consideration of the Act and Regulation indicates that the object and purpose of this regulatory plethora is to protect the employees of farm labour contractors to ensure they are informed, are paid the wages to which they are entitled, and certain minimum standards are met with respect to their work. To put it another way, it is apparent that the mischief the statutory scheme addresses is the need to protect a vulnerable group. The statutory provisions address this mischief by imposing a strict licensing scheme on farm labour contractors.

28. It is not the role of persons employed as farm workers by Dhillon to ensure that Dhillon complies with the *Act*. That responsibility lies solely with Dhillon. It follows that a farm labour contractor who hires a worker, and allows the worker to perform farm labour, without first determining into which account of the worker at a savings institution the worker's wages are to be deposited, does so at his peril. The relevant obligations imposed by the *Act* and *Regulation* are directed at employers. There are no obligations of employees the performance of which might act as conditions precedent to the requirement that the employer pay wages as directed by section 17 of the *Act* and section 40.2 of the *Regulation*. Dhillon cannot justify its failure to comply with the legislation by suggesting its workers are to blame. In this context, they have no statutory obligations to fulfill.

Payroll records

29. The Delegate found that Dhillon contravened the *Act* when it failed to keep payroll records concerning certain of the persons the Team found to be picking berries at the sites in question. Dhillon has responded with the simple statement that the persons in question were not its employees.
30. Whether a person can be said to be an "employee" for the purposes of the *Act* must depend on the application of a legal standard to the relevant presenting facts. It is therefore a question of mixed fact and law (see *Housen v. Nikolaisen* 2002 SCC 33). Whether the Delegate applied the correct legal standard to the relevant facts is, however, solely a question of law.
31. Previous decisions of the Tribunal (see, for example, *Jane Welch, operating as Windy Willows Farm* BC EST #D161/05, citing *Gemex Developments Corp. v. British Columbia (Assessor Area #12 – Coquitlam)* [1998] BCJ No.2275) have confirmed that the types of errors of law the Tribunal may review under section 112 of the *Act* include:
- a misapplication of an applicable principle of general law;
 - acting without any evidence;
 - acting on a view of the facts which could not reasonably be entertained.
32. An example of the applicable principles of general law which must inform a delegate's analysis in a case such as this are the common law tests developed to assist in determining whether a person is an employee. However, they are not conclusive. The primary focus of the inquiry is the wording of the *Act*, and in particular the definition of "employee", which, it has been said, casts a broader net than that which flows from the application of the common law tests (see *Bero Investments Ltd.* BC EST #D035/06). This is consistent with the following comments made by the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.* (1992) 91 DLR 4th 491 at 507, in the context of the Ontario legislation, a close cousin to our own:
- ...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.
33. In the case before me, the Delegate considered the definition of "employee" found in section 1 of the *Act*, the relevant portion of which reads as follows:
- "employee" includes*
- (a) a person...receiving or entitled to wages for work performed for another,
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,...

34. The facts the Delegate considered in determining that the five persons identified in the Reasons for the Determination for whom Dhillon had failed to keep payroll records were nevertheless employees of Dhillon included the following:
- the names of three of the five persons appeared in Dhillon's daily log for one of the days on which a site visit was conducted;
 - the persons in question were interviewed by members of the Team during the site visits and confirmed that they were employees of Dhillon;
 - the Team observed the persons picking berries at the sites for which Dhillon had supplied other farm labour on the days in question;
 - the Team later contacted two of the persons who confirmed they had been paid wages by Dhillon in respect of their work.
35. The requirement that a farm labour contractor keep a daily log is contained in section 6(4) of the *Regulation*, the relevant portions of which read:
- (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.*
36. Having regard to this provision, it was entirely right that the Delegate would infer that the persons named in Dhillon's daily log were its employees for the purposes of the *Act*. Dhillon counters by saying that it does not know how the producer to whom it was supplying farm labour included the names of the three employees on Dhillon's employee list for the day. This explanation is without merit. It is another example of how Dhillon has misconstrued its obligations under the *Act*. The daily log is not the producer's log, it is Dhillon's. Responsibility for the information contained in the log rests with Dhillon, not the producer.
37. Dhillon also argues that it did not transport the persons in question to the relevant work sites in its van. Rather, they found their own way to the site. In respect of some of these persons, Dhillon says that they were merely visiting other Dhillon workers on site, or were working for other farm labour contractors. Dhillon implies that this is some evidence supporting an inference that the persons in question were not hired by it, and that it cannot be responsible for the activities of persons who it does not transport to a site.
38. I suppose that such an argument might help to sustain a different result in a different case, but it is by no means conclusive here. The principal test on the facts of this case is whether Dhillon allowed these individuals, either directly or indirectly, to perform work normally performed by an employee. The uncontradicted evidence of the Team, referred to in the Reasons for the Determination, is that these individuals were observed picking berries with other Dhillon employees during a site visit, and that two

of them subsequently confirmed they received wages for their work from Dhillon. At the same time, there is no evidence from Dhillon that it attempted to deter or prevent these persons from performing the work in question. Indeed, Dhillon acknowledges that it permitted at least one of these persons to do the work as "she want to go their (sic) and have a try" at it, to see if she could perform it. Moreover, Dhillon has provided no evidence from the other farm labour contractors who may have been on site to the effect that some or all of the individuals in question were working for them, and not Dhillon. It merely makes the bald assertion that perhaps they were.

39. I am satisfied on a review of the entire record in this case that the Delegate did not err in law. By this I mean that I am not persuaded either that the Delegate misapplied a principle of the general law, acted without any evidence in support of his conclusions, or acted on a view of the facts which could not reasonably be entertained.

40. For these reasons, the appeal must be dismissed.

41. I do, however, wish to make a comment concerning the content of the record that was provided to the Tribunal by the Delegate in this matter. In my decision in *Malkit Singh Enterprises Ltd.* BCEST #D087/06 I made reference to the obligation which section 112(5) of the *Act* places on the Director to deliver the complete record of material that was before him at the time the determination was made. That record consists not only of the material the Director considers to be relevant, and on which he has relied, but all other material which was before him at the time the determination was made, whether he relied on it or not.

42. The Reasons for the Determination in the case before me demonstrate that the complete record has not been produced. In his Reasons the Delegate refers to a letter sent to Dhillon on April 10, 2006 for the purpose of providing the company with an opportunity to respond to the Delegate's observations that were made in reviewing the payroll records that Dhillon had delivered previously. The Reasons go on to say that Dhillon faxed a reply on April 24, 2006 providing explanations going to the merits of the issues dealt with in the Determination, and raised by Dhillon on this appeal. Copies of neither of those letters appear in the record that was delivered to the Tribunal by the Delegate for the purposes of the appeal. They should have been. Not only were they available, they discussed matters that went to the heart of the issues which had arisen in the complaint.

43. As in *Malkit Singh*, however, I am not prepared to conclude that the Delegate's failure to provide the complete record has compromised my ability, in this instance, to properly decide the appeal. This is so because the Delegate took pains to describe in his Reasons what the missing correspondence contained, Dhillon does not appear to take issue with that description or the fact that the record does not contain the letters, and the comments attributed to Dhillon by the Delegate in the Reasons appear to mirror the company's submissions on this appeal.

44. Having said that, it is obvious that the circumstances in another case may lead me to draw a different conclusion. If, in such a case, the completeness of the record becomes an issue, and requires further investigation and remedial action, the failure of the Director to include the entire record when it is initially requested, as a matter of course, may defeat at least some of the stated purposes of the *Act*, set out in section 2, namely:

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act;...

ORDER

^{45.} For the above reasons, and pursuant to section 115 of the *Act*, I order that the Determination dated May 15, 2006 be confirmed.

Robert Groves
Member
Employment Standards Tribunal