

An appeal

- by -

M.G.B. ENT. LTD.
("M.G.B.")

- 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.: 2017A/91

DATE OF DECISION: September 11, 2017

DECISION

SUBMISSIONS

Gurbhej Brar

on behalf of M.G.B. ENT. LTD.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), M.G.B. ENT. LTD. (“M.G.B.”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 30, 2017. In that Determination, the Director found that M.G.B. had contravened section 6(1)(c) of the *Employment Standards Regulation* (the “*Regulation*”) in failing to immediately notify the Director of a change in the farm labour contractor’s business or residential address, and imposed an administrative penalty in the amount of \$500.
2. M.G.B. appeals the Determination contending that the delegate both erred in law and failed to observe principles of natural justice in making the Determination, and seeks to have the Determination cancelled.
3. This decision is based on M.G.B.’s submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. M.G.B. was incorporated in British Columbia in March 2005. Mr. Brar is the sole officer and director. On March 4, 2015, the Director of Employment Standards issued M.G.B. a farm labour contractor (“FLC”) license for up to 117 workers. The license expiry date is March 3, 2018.
5. As part of the FLC licensing process, applicants are required to pass a written examination in order to satisfy the Director of their knowledge of the *Act* and *Regulation*. Applicants are also interviewed to ensure their understanding of the requirements of the *Act* and *Regulation*. Mr. Brar successfully completed the examination and M.G.B. fulfilled the licensing requirement.
6. On May 2, 2017, the Bevo Farms Ltd. work site at 7170 Glover Road in Langley B.C. was selected for an inspection by the Employment Standards Branch Agriculture Compliance Team (the “Team”). The Team is comprised of officers delegated by the Director to conduct interviews with employees at the work site, inspect the work area and review payroll records.
7. The Team observed M.G.B. employees sorting and pruning flowers and interviewed a random sample of those employees about their wages.
8. On May 10, 2017, the delegate sent M.G.B. a registered letter informing it that the Team was conducting an audit of its payroll records for the employees the Team interviewed at the worksite on May 2, 2017, for the purpose of reviewing compliance with the *Act*. That letter also included a Demand for Employer Records with a deadline for submitting those records of 4:00 p.m. on May 24, 2017. The letter was sent to a Garnet Place, Abbotsford, B.C. address which was listed as M.G.B.’s address on its FLC license and in the BC Corporate Registry.
9. Canada Post returned the letter to the Branch with the notation “moved/unknown.”

10. On May 15, 2017, the delegate contacted Mr. Brar by telephone. Mr. Brar informed him that he and the business had moved to a new address in December 2016. When asked why he did not immediately notify the Director of his change of address upon moving, Mr. Brar stated that he forgot, but that “next time” he would “update.” Mr. Brar also informed the delegate that up to and including May 15, 2017, his mailing address was still the Garnet Place address, but that his mailing address had changed to Downes Road in Abbotsford effective May 16, 2017.
11. The delegate informed Mr. Brar that his preliminary assessment was that M.G.B. was in contravention of section 6(1)(c) of the *Regulation* because the last known address of M.G.B. was that of Garnet Place, an address that Mr. Brar had acknowledged had not been his address for approximately five months. Mr. Brar could not explain to the delegate why, if he had only changed his mailing address as of May 15, 2017, Canada Post would have returned the registered letter on that day indicating M.G.B. had moved. The delegate issued M.G.B. an amended FLC license reflecting its new address.
12. The delegate noted that although section 6(1)(c) of the *Regulation* requires a FLC to “immediately notify the Director of a change in farm labour contractor’s business or residential address”, M.G.B. had not notified the Director of its change of address prior to May 15, 2017. Mr. Brar did not deny that he had failed to immediately notify the Director of a change in M.G.B.’s business or residential address. Although he asserted that M.G.B.’s mailing address continued to be the Garnet Place address, he provided no evidence in support of that, and could not explain why Canada Post would have returned the Director’s registered letter.

Argument

13. M.G.B. contends that the Determination is not supported by the facts. It argues that the delegate’s decision is based on a May 15, 2017, telephone call he had with Mr. Brar that lasted between three to five minutes. M.G.B. contends that the purpose of the call was never explained. M.G.B. further asserts that Mr. Brar answered the delegate’s questions and believed that was the end of the matter, as the delegate did not inform him of any findings that would lead to the imposition of a penalty, or given any opportunity to respond to the findings.
14. M.G.B. says that the Director also requires all FLC’s to provide updated registration documents for each vehicle it uses to transport farm workers. M.G.B. says that it notifies the Director of all vehicle registration changes because it faces a \$10,000 fine for failing to do so. M.G.B. says that when it changed its address in December, it updated its vehicle registrations to reflect the new address and immediately notified the Director of the change of address. M.G.S. says that Mr. Brar hand delivered an updated vehicle registration document for one vehicle in December 2016 and indicated he was doing so as its address had changed. M.G.B. asserts that M.G.B. did comply with section 6 (1)(c) by immediately notifying the Director of its change of address.

ANALYSIS

15. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

- (f) there is no reasonable prospect that the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of section 112(2) have not been met.

16. 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;
- evidence has become available that was not available at the time the determination was being made.

17. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.

Failure to observe the principles of natural justice

18. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

19. There is nothing in the appeal submission that establishes that M.G.B. was denied natural justice.

20. In his submission, Mr. Brar contends that the purpose of the delegate's May 15, 2017, telephone call was never made clear and Mr. Brar was never informed that a penalty could be imposed.

21. The delegate's notes indicate that he informed Mr. Brar that registered mail to M.G.B. had been returned to the Director, and that failing to update M.G.B.'s address with the Director was a contravention of section 6(1)(c) of the *Regulation*. The delegate's notes also indicate that he informed Mr. Brar that M.G.B. appeared to be in contravention of the *Regulation*. I find the delegate's notes, which were made contemporaneously, a more reliable recounting of the May 15, 2017, telephone call and conclude that Mr. Brar was both notified of the possibility of a contravention and offered the opportunity to reply.

22. Consequently, I am not persuaded that Mr. Brar or M.G.B. was unaware of the nature or purpose of the call, and I find M.G.B. had the opportunity to respond.

23. I find no basis for this ground of appeal.

Error of law

24. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

25. Mr. Brar informed the delegate that he moved in December 2016 and acknowledged he had not updated his address with the Director. On that basis, the delegate had evidence on which to find a contravention of section 6(1)(c) of the *Regulation*:

- 6 (1) A farm labour contractor must do all of the following:
- ...
- (c) immediately notify the director of a change in the farm labour contractor's business or residential address;

26. I find no error in the delegate's conclusion.

New Evidence

27. The appeal submission contains information which not only conflicts with the information Mr. Brar gave to the delegate, but constitutes new evidence. Appeals are not an opportunity to provide information to the Director which ought to have been provided during the delegate's investigation.

28. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence 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.

29. Not only does the new information fail to meet the test for new evidence, as it was clearly available at the time the delegate spoke to Mr. Brar, but there is no documentation supporting the assertions. As such, I am unable to assess the credibility of the new evidence.

30. I find no basis to interfere with the delegate's conclusion.

31. The appeal is dismissed.

ORDER

32. Pursuant to section 115 of the *Act*, I Order that the Determination, dated May 30, 2017, be confirmed in the amount of \$500, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal