



An appeal

- by -

Super Sandhu Ent. Ltd.
("SSEL")

- 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.: 2007A/92

DATE OF DECISION: October 18, 2007

DECISION

SUBMISSIONS

Nash N. S. Gill, Barrister & Solicitor on behalf of Super Sandhu Enterprises Ltd.
Reena Grewal on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Super Sandhu Enterprises Ltd. ("SSEL"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 18, 2007.
2. After conducting a worksite visit, the Director's delegate determined that SSEL had failed to maintain and make available a daily log at a worksite. The delegate found that SSEL had contravened section 29(1) of the *Employment Standards Regulation, B.C. Reg. 396/95* (the "*Regulation*") in failing to meet a condition of its farm labour contractor license. As this was SSEL's third contravention, the Director imposed a \$10,000.00 administrative penalty on SSEL.
3. SSEL says that the Director's delegate erred in law in. It also claims that it has new evidence that was not available at the time the Determination was being made.
4. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although SSEL sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties. I also conclude that an oral hearing is unnecessary on the issue of whether there is new and relevant evidence. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

FACTS AND ARGUMENT

5. The facts as set out by the delegate are as follows.
6. SSEL is a licensed farm labour contractor under the *Act*. On October 22, 2004, SSEL was issued a farm labour contractor license permitting them to employ a maximum of 285 employees. The license expires October 22, 2007.
7. On June 19, 2007, the Employment Standards Agriculture Compliance Team conducted a worksite visit at Pacific West Perennials to ensure that Farm Labour contractors were in compliance with the *Act* and *Regulations*. SSEL provided contract work to Pacific West Perennials for nursery work. As the owner of SSEL, Gurcharan Sandhu, was not present at the time of the site visit, the delegate spoke with the two SSEL employees at the site in Punjabi. He asked them about their rate of pay, pay dates, their place of

residence, telephone numbers and whether their wages were paid by direct deposit. The employees provided the delegate the information he requested. The delegate then explained to the employees that SSEL was required to leave a daily log, or a list of all the workers working for SSEL, at the site and asked whether Mr. Sandhu had left the log with them. Neither of the employees provided the delegate with the daily log.

8. On June 22, 2007, the delegate sent SSEL a letter asking it to respond to the allegation that it had failed to produce a daily log. A response was required by July 2, 2007. On July 3, 2007, SSEL sent a letter stating that on the day of the Branch Team's visit, the two employees had the daily log with them but because they were uneducated, they did not understand what the delegate was asking. SSEL further said that the employees could not recall the delegate asking for the daily log, but if they were, they may not have understood because of language issues.
9. The delegate concluded that SSEL had failed to make a daily log available for inspection, contravening section 6(4) of the *Regulation*. The delegate noted that the two employees communicated with the delegate on site about their length of employment, whether they were paid semi-monthly and other questions. The delegate noted that there was no explanation as to why the employees did not understand the delegate's request for a daily log. The delegate noted that the wording of section 6(4) required the contractor's responsibility to keep the daily log at the worksite and make it available for inspection. Further, the delegate notes that SSEL was aware of the requirements of the *Act* and *Regulation* because it had been through the farm labour contractor licensing process and Mr. Sandhu had written an exam about the requirements.
10. The delegate found SSEL in contravention of the *Regulation*. In accordance with section 29(3), the delegate imposed a penalty of \$10,000 as SSEL had two prior contraventions.
11. In his submission, counsel for SSEL repeats comments that appear to have been the subject of the July 3, 2007 letter. He contends that the employees were not asked about the daily log, or if they were, they did not understand what they were being asked. He submits that one of the employees had a "piece of paper" in his lunch bag that had been given to him by Mr. Sandhu, and that paper was the daily log.
12. Counsel also submits that while the delegate spoke Punjabi, the employees, while able to understand basic questions, did not understand more complex questions. He submits that, having recently arrived from the Punjab, the employees' spoken Punjabi was different from the delegate's spoken Punjabi and they did not understand it. Counsel for SSEL submits that the *Regulation* was not contravened as the daily log for the employees was at the worksite.
13. In support of the appeal, counsel submitted a document purported to be the June 19, 2007 daily log and statutory declarations from the two employees.
14. The delegate submits that the employment standards officer on site had no difficulty communicating with the employees. The delegate contends that it is irrelevant why the log was not presented for inspection, as the Determination was issued for the employer's failure to do so, and seeks to have the Determination upheld.

ISSUES

1. Whether the delegate erred in law; and
2. Whether there is new and relevant information available that was not available at the time the Determination was being made.

ANALYSIS

15. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
16. The burden of establishing the grounds of the appeal rests with an appellant.

Error of Law

17. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
18. SSEL does not identify how the delegate erred in law. Rather, the appeal is simply that the delegate failed to conduct a proper investigation and arrived at an “unfair and unreasonable” conclusion. In my view, this argument does not constitute an error of law and I would dismiss the appeal on that ground.
19. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 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.

20. The “new evidence” consists of statutory declarations that contain declarations of the employees referred to in the employer’s letter to the delegate of July 3, 2007 as well as the purported log of the day in question. All of these documents were available to SSEL at the time of the delegate’s investigation and I decline to consider them on that basis.

21. However, I will nevertheless address the argument that SSEL has an “excuse” for not complying with the *Regulation*, which is that the required document was in one of the employees’ paper lunch bag and that the employee, because of language difficulties, did not comprehend what was being asked and did not deliver the paper to the delegate on site.

22. It is the employer’s responsibility to structure its affairs, including records maintenance, in accordance with the *Act*. (see *478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* (BC EST #D 279/98)). The employer does not dispute that it is aware of the specific requirement of having a daily log on the work site, and I infer that it is by virtue of the fact SSEL has had two prior contraventions.

23. The language of section 6(4) makes it clear that it is the farm labour contractor’s responsibility to make the daily log available for inspection, not the Farm Labour Contractor Team’s job to seek it out. (see *Dhillon Labour Contractors Ltd.*, BC EST #D005/06). Given that SSEL was aware of its obligations under the *Act* and *Regulations*, if the employees had language difficulties, Mr. Sandhu ought to have advised them what the “piece of paper” was, and what to do with it in the event of an inspection.

24. In reply, counsel for SSEL says that there is no evidence the delegate was able to communicate with the employees and contends that without an oral hearing is necessary to determine this. He submits that the delegate has a responsibility to communicate effectively with the farm employees at the educational level of that employee. I find no merit to this submission. The *Regulation* imposes obligations on an employer to comply with the *Act*. The employer cannot use alleged language difficulties of his employees as an excuse for his failure to comply.

25. The appeal is dismissed.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 19, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal