

An appeal

- by -

Malkit Singh Enterprises 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: John Savage

FILE No.: 2007A/100

DATE OF DECISION: November 13, 2007

DECISION

SUBMISSIONS

Jaskaran Sandhu, for Malkit Singh Enterprises Ltd.

Karry Kainth, for the Director of Employment Standards

INTRODUCTION

1. Malkit Singh Enterprises Ltd. (“Malkit Singh”) appeals a determination of the Director dated July 26, 2007, (the “Determination”) in which the Director found that Malkit Singh had contravened two provisions of the *Employment Standards Act* and Regulations (the “Act”). As a result of the contraventions, administrative penalties totaling \$1000 were imposed.
2. Malkit Singh is a farm labour contractor. On June 20, 2007, the Employment Standards Agricultural Compliance Team (the “ESACT”) conducted a site visit at Grewal Berry Farms Inc. (“Grewal Farms”) located in Surrey, BC. Malkit Singh had provided Grewal Farms with employees as contract labour for harvesting strawberries.
3. At the time of the site visit, the representative of Malkit Singh was not on site. The daily log which includes a record of employee names was not on site because it was with Jaskaran Sandhu (“Sandhu”), a principal of Malkit Singh.
4. When Sandhu arrived with the daily log it was incomplete and Sandhu asked for time to complete it. The completed log had eight names, although the ESACT interviewed nine persons who said they were employed by Malkit Singh. The farm labour contractor license of Malkit Singh indicated that Malkit Singh was licensed to employ a maximum of seven employees on a single day.
5. The Director conducted an investigation. He found that Malkit Singh had breached the provisions of the *Act* and Regulations by (1) not having a daily log on site at the time of the ESACT visit, or an accurate daily log, and (2) by employing more employees than its license permitted.
6. Malkit Singh appeals the Determination arguing that the Director failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was made. In its reply, Malkit Singh makes an allegation of bias. The Tribunal determined to hear the appeal by written submissions.

ISSUES

7. The two issues in the appeal are:
 - (1) Did the Director breach the rules of natural justice in coming to his Determination?
 - (2) Has evidence become available that was not available at the time the Determination had been made?

Breach of the Rules of Natural Justice

8. In this case the Director conducted an investigation under the *Act*. In conducting the investigation representatives of the Director interviewed witnesses including a representative of Malkit Singh at the site at the time of the alleged breaches of the *Act* and Regulations.
9. In addition to interviewing witnesses, the Director wrote to Malkit Singh on June 22, 2007, saying that it found contraventions of section 6(4) of the Employment Standards Regulation and Section 13(1) of the *Employment Standards Act*. Malkit Singh was given until July 2, 2007, to respond. This date was extended further until July 11, 2007, at the request of Malkit Singh.
10. In its reply, Malkit Singh admits that it did not have the log on the site at the time the ESACT team first attended. The letter says that two people who were on the list were not employees. It also references a letter dated June 25, 2007, that was critical of members of the ESACT team that attended the site.
11. A Delegate's duties under section 77 have been described in the decision of this Tribunal in *Inshalla Contracting Ltd.* BC EST RD#054/06.
12. An investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, it has been held that the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board* [1980], 1 S.C.R. 602. In general, the appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, [1978], 29 O.R. (2d) 292.
13. In the case of investigations under the *Employment Standards Act*, the duty of fairness will almost invariably require informed notice of the issue to the parties. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch.
14. To participate in the decision making by a public body or public official, however, individuals must possess sufficient information to enable them to make representations on their own behalf, to effectively prepare their own case and answer the case they have to meet. It is therefore a fundamental element of the duty of fairness at common law that prior notice be given to those entitled to participate in a decision.
15. On the other hand, however, this Tribunal has held that the Director during an investigation should not be placed in a procedural strait-jacket, *Isulpro Industries Inc.*, BC ESTD# 405/98, so there must be an element of reasonableness applied.
16. Section 77 of the *Employment Standards Act* relates specifically to investigations under the *Act*. It provides as follows:

“77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.”
17. As noted by this Tribunal, section 77 does not mandate a face-to-face hearing or meeting between the Delegate and person under investigation, but it does require that reasonable efforts be made so that the

person under investigation is made aware of the allegations and be given a reasonable opportunity to respond: *Re Medallion Developments Inc.*, [2000], BC EST D#235/00.

18. In my opinion there was no breach of natural justice by the Delegate in conducting the investigation.
19. A representative of Malkit Singh was interviewed at the site at the time of the alleged contraventions. Malkit Singh was further advised of the concerns by correspondence that indicated possible contraventions of section 6(4) of the Regulation and section 13(1) of the *Act*. Malkit Singh was provided with a further opportunity to make written submissions and availed itself of that opportunity by making a written submission and enclosing further documents.
20. In the circumstances, in my opinion, there was no breach of natural justice that could arise through this procedure.
21. In its reply, Malkit Singh makes an allegation of bias against a member of the ESCAT team. There is nothing in the record that substantiates that allegation, moreover, if it were an issue it should properly be raised as a ground of appeal, not in a final reply submission.

New Evidence

22. Section 112(1)(c) of the *Act* provides a right of appeal where a party has evidence that “has become available that was not available at the time the determination was being made.” In deciding whether the Tribunal should receive new evidence on appeal, the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.
23. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing (the “Due Diligence Requirement”), (2) the evidence must be relevant to a material issue in the appeal (the “Relevancy Requirement”), (3) the evidence must be credible in the sense that it is reasonably capable of belief (the “Credibility Requirement”), and (4) the evidence must have high 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 a material issue (the “Probative Value Requirement”).
24. Malkit Singh submitted additional evidence with its submission. It submitted a letter in English dated September 3, 2007. Above the name “Hakan Singh Dhaliwal” the letter is signed by the letters “H S D” and above the name “Mukhtiar Kaur Dhaliwal” the letter is signed “M K D”. The letter says these people were not employed by Malkit Singh “for the season of 2007”.
25. In its final reply submission Malkit Singh also submitted a letter dated August 31, 2007, from Grewal Farm regarding the employment of Pritam Kaur Sidhu. It says that Pritam Kaur Sidhu was not employed by Malkit Singh but was on the payroll of Grewal Farm, and encloses a receipt for \$18 that was paid on July 1, 2007, for the period “June 16 to June 30, 2007”.
26. Both of these statements concern events in June 2007. There is no explanation why they were not submitted earlier during the investigation. The information contained in the statements is inconsistent with the information gathered at the site by the ESACT team. The ESACT team interviewed Hakan

Singh Dhaliwal and Mukhtiar Kaur Dhaliwal. According to the Delegate, at the time of the interview they identified Malkit Singh as their employer. With respect to the letter concerning Pritam Kaur Sidhu, at the time of the ESACT team interview, Preetum K. Sidhu was identified and admitted to employment by Malkit Singh.

27. According to the evidence, it is uncontradicted that the employer completed the daily log on the site after bringing it to the site when requested to do so by the ESACT team. The representative of Malkit Singh completed the log on the site. It included eight employees although the farm labour contractor license was only for seven employees. It included eight employees but there were nine employees on site that identified Malkit Singh as their employer.
28. In my opinion, the documents that are submitted and the evidence they contain are not evidence that has “become available that was not available at the time the determination was being made” within the meaning of section 112(1)(c). They are statements taken some months after the events after the investigation was completed and the Determination of the Delegate rendered. Both letters are dated well after the Determination was issued. Both letters assert matters that could have as easily been attested to early on in the investigation and presented to the Delegate. The proposed evidence fails to meet the Due Diligence requirement.
29. Failing to meet one of the requirements for the admission of evidence is sufficient to disqualify the admissibility of such evidence. In my opinion, however, the proposed evidence also fails the Probative Value Requirement. First, regarding the breach of section 6(4) of the Regulations, Malkit Singh’s submission acknowledges that it did not have the daily log on the job site at the time of the arrival of the ESACT team. Thus, even if this evidence were accepted, a breach of section 6(4) has been made out. Moreover, even if the statements are accepted as correct, there were nine persons on the site that identified themselves as being employed by Malkit Singh at the time of the inspection. Malkit Singh produced their own daily log that showed eight persons employed, one more than their licence authorized.
30. In my opinion, it is not open to a person appealing a Determination to bolster or reinforce their position with confirmatory statements collected after the Determination has been issued, and seek to have that evidence introduced as evidence that was not available at the time the Determination was made: *Re Triple S Transmission Inc.* BCEST #D141/03, *Re Jagir Enterprises Ltd.*, BCEST #D191/05. If that were the case, then appeals to this tribunal would take the form of new hearings of evidence, where the tribunal would be called upon to determine afresh matters of credibility and the weight of evidence.
31. The legislature, however, has made it clear that appeals from the Determination of the Director are a limited form of review, and where new evidence is sought to be admitted, it could not have been *available* at the time of the Determination. Evidence such as statements from witnesses is evidence that with ordinary diligence can be procured to support a position well before a Determination is made. The appeal on this ground fails.

SUMMARY

32. There was no breach of natural justice in the conduct of the investigation. The evidence sought to be introduced on appeal is evidence that was available at the time of the Determination.

ORDER

33. Pursuant to section 115 of the Act I confirm the Determination of the Delegate.

John Savage
Member
Employment Standards Tribunal