

An appeal

- by -

Ajmer S & Jagjeet S Bhuller carrying on business as Bhuller Farm
(“Bhuller Farm”)

- 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 E. D. Savage

FILE No.: 2007A/120

DATE OF DECISION: December 11, 2007

DECISION

SUBMISSIONS

Ajmer and Mandeep Bhuller	on behalf of Bhuller Farm
Reena Grewal	on behalf of the Director of Employment Standards

OVERVIEW

1. On August 2, 2007, the Employment Standards Agriculture Compliance Team (the “Team”) conducted a site visit at Ajmer S & Jagjeet S Bhuller carrying on business as Bhuller Farm (“Bhuller Farm”) located at 18621 Ford Road in Pitt Meadows, BC.
2. The Team interviewed workers harvesting blueberries. It interviewed RH¹ who was observed picking blueberries.
3. According to the Team, RH was observed harvesting blueberries alongside other employees. RH was wearing a rope around his waist with a hook attached to it. The hook is normally used to attach a berry picking bucket. RH was also observed carrying a berry flat.
4. RH gave his date of birth to the Team which indicated that he was 11 years old at the time. RH continued to harvest blueberries while being interviewed by the Team.
5. On August 8, 2007, a Delegate of the Director wrote to Bhuller Farm advising that RH was found performing work without a child permit. Section 9(2) of the *Employment Standards Act* (the “Act”) provides that a person must not employ a child under 12 years of age without the director’s permission.
6. Bhuller Farm did not deny that RH was under 12 or that he did not have the director’s permission. Bhuller Farm did, however, write to the Director on August 16, 2007, stating that RH was not employed by Bhuller Farms but “...may have been picking some blueberries for a brief period for his/her personal consumption during only a visit with his/her parent(s)...”
7. In her Determination of August 28, 2007, (the “Determination”) the Delegate found that Bhuller Farm had breached section 9(2) of the *Act* and imposed an administrative penalty of \$500.
8. Bhuller Farm appeals arguing that evidence has become available that was not available at the time the Determination was made.
9. Bhuller Farm attached a copy of a letter from one of RH’s parents saying that RH was “...only visiting on that particular day for a period of time and decided to pick berries with me during the visit”. The letter further explained that this was not a regular activity and asserted that RH “does not work for Bhuller Farm”.

¹ RH is a minor child under the age of 12.

ISSUE

10. The issues that arise in this appeal are (1) whether new evidence has become available that was not available at the time the Determination was being made, and (2) the standard of review on an appeal to this Tribunal from a Determination of the Director.

LEGISLATIONS

11. The section of the *Act* that was alleged to be contravened is section 9 of the *Act*. That section reads as follows:

- 9.(1) A person must not employ a child under 15 years of age unless the person has obtained the written consent of the child's parent or guardian.
- (2) A person must not employ a child under 12 years of age without the director's permission.
- (3) On permitting the employment of a child under 12 years of age, the director may set the conditions of employment for the child.
- (4) An employer must comply with the conditions of employment set under subsection (3).

1995, c. 38, s. 9. 2003, c. 65, s. 3.

12. On an appeal under the *Act*, the parties are limited to the grounds of appeal set out in section 112:

- 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.

DISCUSSION AND ANALYSIS

Section 9

13. Section 9 of the *Act* places terms and conditions on the employment of young people, specifically children under 15, who may not be employed without the permission of their parents, and children under 12, who may not be employed without the permission of the Director, who may set the conditions of employment.
14. It is apparent that the Legislature saw fit to leave parents with the discretion to allow their children to be employed once they had reached the age of 12, but under that age, the Director must provide permission and may impose terms and conditions.

15. These provisions are to safeguard the interests of children. In the case of children under 12 years of age, the legislature saw fit to require the intervention of a third party, namely, the Director, to consider the circumstances, to grant or withhold permission, and to impose conditions if and where desirable.

Appeal Limited Form of Review

16. The appeal provisions under the *Act* are statutory, and therefore constitute a code with respect to the grounds of appeal.
17. It is not open, for example, for this Tribunal to interfere with a finding of the Director in a determination merely because the Tribunal might be of another opinion, or take issue with some factual inference or with a finding which is a mixed finding of fact and law.
18. Appeals are limited to situations where an error of law has been committed, or there is a failure to observe the principles of natural justice, or where there is new evidence, that is, evidence that has become available, that was not available at the time the determination was being made.

New Evidence

19. Section 112(1)(c) of the *Act* provides a right of appeal where a party has “evidence has become available that was not available at the time the determination was being made”.
20. 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.
21. 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, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, 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.
22. Where the evidence sought to be led could be described as, to some degree, confirmatory of the evidence provided during the investigation, in general such evidence is not to be admitted if it was available to be presented earlier during the investigation: *Re Big Olive Taverna*, BC EST # D 440/00.
23. In this case the Delegate, by correspondence dated August 8, 2007, invited Bhuller Farm to respond to the allegation that RH was employed while being a child under 12. The evidence sought to be admitted here is simply correspondence that tends to confirm the position that the Appellant sought to make out during the course of the investigation. It is not new evidence but is evidence that with ordinary diligence could have been obtained and presented by Bhuller Farms.
24. Moreover, the evidence, in my view, is not of high probative value. At the time of the site visit, RH was observed wearing paraphernalia appropriate to being employed as a picker, a hook to carry a bucket to contain berries, and carrying flats, which are used to hold berries. The correspondence from RH’s parent confirms that RH carried a bucket to contain picked berries. There is no suggestion in the evidence that

Bhuller Farm was a site where persons could freely pick berries for their own consumption or use, or that people consuming occasional berries would do so wearing and using such paraphernalia.

25. In the circumstances, I find that the evidence sought to be admitted is not evidence that has become available that was not available at the time the determination was being made. It is not, therefore, new evidence that should have been considered. Moreover, in my opinion, the evidence submitted is not of high probative value.

SUMMARY

26. The evidence sought to be introduced does not comply with the standards for the admission of new evidence established by this Tribunal in *Re Merilus Technologies Inc.*, [2003] BC EST # D171/03. It is evidence that with ordinary diligence could have been obtained and is not highly probative.

ORDER

27. The Determination of the Director is confirmed pursuant to section 115 of the *Act*.

John E. D. Savage
Member
Employment Standards Tribunal