

An appeal

- by -

Chohan Labour Contractor Ltd.
(“Chohan“)

- 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 E. Groves

FILE No.: 2010A/125

DATE OF DECISION: November 30, 2010

DECISION

SUBMISSIONS

Ravi Sandhu

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought on behalf of Chohan Labour Contractor Ltd. (“Chohan”) challenging a determination of a delegate of the Director of Employment Standards (the “Delegate”) dated August 11, 2010 (the “Determination”).
2. In the Determination, the Delegate found that Chohan had contravened section 6.1 of the *Employment Standards Regulation* (the “*Regulation*”) when it failed to post in one of its vehicles used to transport employees the requisite notice respecting applicable vehicle and passenger safety requirements. In the result, and as Chohan had previously contravened section 6.1, the Delegate levied a \$2,500.00 administrative penalty pursuant to section 29 of the *Regulation*.
3. I have before me the Determination, the Delegate’s Reasons for the Determination, the Appeal Form and appended documents received from Chohan, and a submission from the Delegate attaching what I assume to be the record referred to in section 112(5) of the *Employment Standards Act* (the “*Act*”).
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. My review of the material before me persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. Chohan is a licensed farm labour contractor under the *Act*.
6. On July 9, 2010, the Employment Standards Branch Agriculture Compliance Team conducted roadside checks to inspect vehicles being used to transport farm workers to and from work sites. One of the items of interest for the Team was whether the vehicles checked were observed to be in compliance with the requirements of section 6.1 of the *Regulation*, which reads:
 - 6.1 (1) A farm labour contractor must, in every vehicle used by the farm labour contractor to transport employees, post a notice provided by the director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers Compensation Act*, including the driver, seating, and seat belt requirements.
 - (2) A notice required to be posted under subsection (1) must be displayed in one or more positions in the vehicle that are clearly visible to the driver or operator of the vehicle and employees riding in the vehicle.
7. The Team checked a vehicle being used by Chohan to transport farm workers. No posted notice was visible.

8. On July 15, 2010, the Branch sent a letter to Chohan advising what had transpired during the inspection. The letter referred to section 6.1, stated that Chohan appeared to have been in violation of that provision, and invited submissions in reply by July 26, 2010, failing which a determination would be issued.
9. The Delegate says that the July 15, 2010, letter was sent on the same day by ordinary mail to the business address for Chohan. I note that the address on the letter is the same address given by Chohan on its Appeal Form. The Delegate says further that the letter was not returned to the Branch.
10. When no reply was received from Chohan, the Delegate issued the Determination.
11. Chohan appeals alleging that it did not receive the July 15, 2010, letter until September 15, 2010, a date that was some weeks after the Determination was issued.
12. As for the merits, Chohan states that the notice mandated by section 6.1 was in the vehicle on the date of the inspection:
- ...but some how it fell down on the floor of the vehicle, probably as it was not properly secured with tape or other device, for which we are very sorry & assure that we will be more careful and this sort of negligence won't happen in the future.
13. Chohan therefore asks that the penalty be rescinded.

ISSUE

14. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

15. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 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. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

17. Chohan's Appeal Form indicates that its appeal is based on section 112(1)(c). The new evidence on which it relies consists of its assertion that it did not receive the July 15, 2010, letter from the Branch until after the Determination was issued, rendering nugatory the opportunity given in that correspondence for Chohan to deliver submissions in reply to the allegations arising from the Delegate's investigation. It also consists of its statement in its material delivered to the Tribunal with its Appeal Form explaining why the section 6.1 notice was not observed by the Team when it conducted its inspection of the Chohan vehicle on July 9, 2010.
18. While the Chohan appeal does not raise the issue directly, its new evidence asserts, in substance, that there may have been a failure of natural justice in the proceedings leading to the issuance of the Determination. Section 77 of the *Act* sets out the relevant statutory obligations of the Director in this way:
 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
19. I must say that I am sceptical it can be concluded with certainty that the Director violated this prescription in this instance. However, I do not think it is necessary for me to decide that question because I believe there is another basis which has emerged from the factual matrix which drives me to conclude that the appeal must be dismissed.
20. In my view, this is one of the category of cases where a failure on the part of Director to observe the principles of natural justice, assuming it has happened, may nevertheless be cured on appeal (see *Taiga Works Wilderness Equipment Ltd. v. Director of Employment Standards and the Employment Standards Tribunal* 2010 BCCA 97).
21. As has been oft-stated in the decisions of the Tribunal concerning its appellate jurisdiction under the *Act* in its current form, the ability of the Tribunal to find facts is a restricted one. In most cases, it will be a delegate of the Director who finds the relevant facts, and the Tribunal has no jurisdiction to alter those findings unless an appellant demonstrates that the delegate has committed an error of fact that also constitutes an error of law.
22. As noted in *Taiga*, where, as here, an appellant relies on section 112(1)(c) of the *Act* and supports its position on appeal with new evidence, the Tribunal possesses a fact-finding function, which may, in appropriate circumstances, permit it to cure a failure to observe the principles of natural justice on the part of a delegate. In my view, such a power advances a purpose of the *Act*, set out in section 2, that it provide fair and efficient procedures for resolving disputes over its application and interpretation.
23. Here, Chohan has stated in its material filed in support of its appeal that the section 6.1 notice was not properly posted in its vehicle at the time of the inspection because it was improperly affixed and had fallen onto the floor due to someone's negligence. The Delegate takes no issue with this explanation, but argues, rightly in my view, that the Chohan submission establishes its failure to comply with the *Regulation*.
24. Since the notice was on the floor of the vehicle at the relevant time, it cannot be said that it was displayed in a position where it was clearly visible to the driver or operator of the vehicle or the employees riding within it. That is sufficient, in the circumstances, to render Chohan in contravention of section 6.1.

ORDER

25. Pursuant to section 115 of the *Act*, I order that the Determination dated August 11, 2010, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal