

An appeal

- by -

0844840 B.C. Ltd.
(the “Employer”)

- 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: Shafik Bhalloo

FILE No.: 2010A/138

DATE OF DECISION: December 6, 2010

DECISION

SUBMISSIONS

Gurminder Sidhu on behalf of 0844840 B.C. Ltd.
Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 0844840 B.C. Ltd. (the “Employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”), of a determination of the Director of Employment Standards (the “Director”) issued on August 19, 2010 (the “Determination”).
2. In the Determination and Reasons for the Determination, the delegate for the Director concluded that the Employer had contravened sections 6 and 6.1 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “Regulation”) by failing to file with the Director an up-to-date list of all vehicles used for transporting farm workers and to post a notice, within the vehicle, provided by the Director respecting vehicle and passenger safety requirements respectively.
3. As this was the Employer’s second offence under section 6 of the *Regulation*, the Director imposed an administrative penalty of \$2,500 pursuant to section 29 of the *Regulation*, in addition to a penalty of \$500.00 for the contravention under section 6.1 of the *Regulation* for a total of \$3,000.
4. The Employer contends that the delegate for the Director failed to observe the principles of natural justice in making the Determination and is seeking the cancellation of the Determination.
5. Pursuant to section 36 of the *Administrative Tribunals Act* (the “ATA”), which is incorporated in 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. While the Employer has not specifically requested an oral hearing, in my view, an oral hearing of the appeal is not necessary to decide the issues in this appeal and, therefore, I propose to adjudicate the appeal based on the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

6. The issue in this appeal is whether the delegate for the Director failed to observe the principles of natural justice in making the Determination.

FACTS

7. The Employer was licensed under the *Act* as a farm labour contractor (“FLC”) for up to 40 employees. The license is valid until February 12, 2013.
8. On June 23, 2010, the Employment Standards Branch Agriculture Compliance Team (the “Team”) conducted roadside checks to inspect vehicles used to transport farm workers. One of the vehicles inspected was a grey Dodge Caravan with a license plate no. 879 TFK (the “Vehicle”). The Vehicle was driven by Daljinder Baghri (“Mr. Baghri”). A member of the Team interviewed Mr. Baghri on site and he confirmed

that he was employed by the Employer and responsible for transporting workers as part of his job duties. He also confirmed that the Employer owned the Vehicle he was driving.

9. The registration search of the Vehicle showed that the owner of the Vehicle was Rupinder Johal (“Mr. Johal”), who was not present in the Vehicle at the time of the Team’s inspection. Upon further investigation by the Team, it was discovered that the Vehicle was not registered with the Employment Standards Branch (the “Branch”) and did not have a notice posted within it that was provided by the Director respecting vehicle and passenger safety requirements under the *Motor Vehicle Act* and the *Workers’ Compensation Act*.
10. On June 30, 2010, the delegate of the Director sent the Employer a letter providing the latter an opportunity to respond to the observations the Team made during its roadside check of the Vehicle on June 23, 2010.
11. On July 9, 2010, Charanjit Mangat (“Mr. Mangat”), on behalf of the Employer, responded to the delegate’s correspondence stating that the Vehicle did not belong to the Employer, but was owned by one of the Employer’s employees and the owner of the Vehicle was providing transportation for his co-workers who “were going on their own ride”.
12. The delegate of the Director, in the Reasons for the Determination, concluded that the Employer’s response was insufficient as at the time of the roadside check, the driver of the Vehicle, Mr. Baghri, confirmed that the Vehicle did not belong to him and that he was simply transporting the Employer’s employees to a work site in a vehicle provided by the Employer. The delegate further reasoned that if, as contended by the Employer, the employees were carpooling in the Vehicle, then the owner of the Vehicle should have been driving the Vehicle, but that was not the case in this instance and that the Employer did not provide any evidence to substantiate its claim in this regard.
13. The delegate also reasoned that the requirements of section 6 and 6.1 of the *Regulation* do not simply apply in the case where the FLC owns a vehicle used to transport its employees but also where an FLC is using a vehicle it does not own to transport its employees. In this case, according to the delegate, the Employer fell in the latter category and was obliged to comply with the requirements of sections 6 and 6.1 of the *Regulation* but failed to do so.
14. As the Employer had previously, on March 30, 2010, contravened 6 of the *Regulation*, the delegate levied a penalty of \$2,500.00 for the second contravention of section 6 in addition to the \$500.00 administrative penalty for the contravention of section 6.1 of the *Regulation*.

THE EMPLOYER’S SUBMISSIONS

15. Mr. Sidhu, the owner of the Employer, submits that the Employer’s employees were “as previously discussed...simply carpooling on the date of the alleged contravention” and it is not for the Employer “to verify with each employee which vehicle they will be driving to work” on a daily basis or verify whether they are driving in a vehicle registered to them. Mr. Sidhu further argues that the Vehicle “was a personal vehicle of (an) employee and not registered in any way” by the Employer and, therefore, “no contravention ever took place” of sections 6 and 6.1 of the *Regulation*.
16. Mr. Sidhu also contends that Mr. Baghri was untruthful when he said to the Team that the Employer owned the vehicle as the Vehicle was registered to his relative, Mr. Johal, who is known to Mr. Bhagri and “has no affiliation” with the Employer. According to Mr. Sidhu, the Employer should not be made responsible for the “condition of the vehicle with or without notices” in such case and it is not the Employer’s responsibility

“to be responsible for every single vehicle on the road, driven to the job site not owned or affiliated” with the Employer.

17. Mr. Sidhu also submits that Mr. Baghri was effectively lying when he said that one of his duties was to transport fellow workers for the Employer.
18. Mr. Sidhu also argues that it is not the responsibility of the Employer in this case to provide information to the Team or to the Branch that “one of its workers borrowed a car of a person known to them” to drive his co-workers to work, particularly when the car is not associated with the Employer.
19. In the Employer’s final reply, Mr. Sidhu, in response to the Director’s submissions below, submits a typed letter from Mr. Mohinder S. Randhawa dated November 22, 2010. Mr. Randhawa claims that he was employed as a driver with the Employer in June 2010. He further states that on June 23, 2010, the date when the Team conducted its investigation and stopped Mr. Baghri, Mr. Randhawa “was not feeling good” and was unable to pick up “workers from their residence and drive them to work Site [sic]”. Mr. Randhawa states that he requested his nephew, Mr. Johal, to pick up “some workers” on his behalf and drop them off at the Employer’s job site, and Mr. Johal, in turn, requested his friend, Mr. Baghri, to pick up the workers and provided him with the Vehicle for the purpose. He further submits that Mr. Sidhu, the owner of the Employer, had no knowledge of this at the time.

SUBMISSIONS OF THE DIRECTOR

20. The Director submits that the Employer, during the investigation of this matter, advanced the argument that the employees were simply carpooling and this argument was dealt with in the Determination. Therefore, this is a re-argument on the part of the Employer.
21. The Director further argues that the Employer is mistaken or incorrect in its understanding that section 6 and 6.1 of the *Regulation* do not apply in this instance simply because the Employer is not the owner of the Vehicle. According to the Director, the sections in question apply in the case of any vehicle used by a FLC to transport its employees and not simply in cases where the FLC owns the vehicle used to transport its workers.
22. The Director further submits that Mr. Baghri’s evidence in the form of representations to the Team that the Vehicle he was driving belonged to the Employer and he was using it to transport the Employer’s employees which was one of his responsibilities, is to be preferred over the Employer’s suggestion in the appeal that Mr. Baghri was untruthful in his said representations to the Team.
23. The delegate further points out that the Employer’s credibility is called into question when it argues in the appeal, on the one hand, that the Vehicle was owned by Mr. Johal, an individual only known to Mr. Baghri and with no affiliation to the Employer, but in the investigation it represented to the delegate (in Mr. Mangat’s correspondence) that the owner of the Vehicle was one of its employees. This inconsistency, according to the Director, brings into question the Employer’s credibility.

ANALYSIS

24. Section 112(1) of the *Act* sets out three available grounds upon which a party may appeal a determination:
 - (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.

25. As indicated previously, the Employer has alleged in this appeal that the Director failed to observe the principles of natural justice. Natural justice, in administrative proceedings such as the one in this case, includes procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision maker (see *607730 B.C. Ltd. operating as English Inn Resort*, BC EST # D055/05).
26. Having said this, the burden of proof, in this case, is on the Employer to show on the balance of probabilities that the Determination under appeal ought to be cancelled because the Director failed to observe the principles of natural justice in making the Determination. In my view, the Employer has failed to discharge that onus, as there is no evidence of an infringement of the principles of natural justice. The delegate clearly advised the Employer, by way of correspondence dated June 30, 2010, of the observations the Team made during its roadside investigation of the Vehicle on June 23, 2010, and afforded the Employer an opportunity to respond to the observations of the Team, which the Employer did with Mr. Mangat's letter of July 9, 2010.
27. In my view, the owner of the Employer, Mr. Sidhu, in his submissions on appeal is simply rearguing the position the Employer took during the investigation of the matter and simply reiterating why the Employer disagrees with the decision of the delegate. However, an appeal of a determination to the Tribunal is not a re-investigation of the complaint or a second opportunity for a dissatisfied party to take the proverbial "second kick at the can". To be successful on appeal, the appellant must be able to satisfy the Tribunal that its appeal is properly based on one of the available grounds of appeal under section 112 of the *Act* and here the Employer has failed to do that.
28. I have also examined the reasoning of the delegate in the Reasons for the Determination. The delegate preferred the evidence of Mr. Baghri with good reason, stating that Mr. Baghri responded to the questions put to him during the roadside check in a "confident manner" and "his statements were accurate and credible". The Director pointed out the inconsistency in the evidence of the Employer, who submitted during the investigation, that the owner of the Vehicle was one of its employees, and then claimed in the appeal submissions that the owner was someone only known to Mr. Baghri and not "affiliated" with the Employer. While it is not for this Tribunal to second guess a finding of credibility on the part of the delegate of an important witness, in this case Mr. Baghri, I simply observe that there is no vested interest for Mr. Baghri in this case to lie about being employed by the Employer and that one of his responsibilities was to transport the Employer's workers.
29. Finally, I note that in the final reply of the Employer, Mr. Sidhu has submitted the statement of Mr. Randhawa, who was purportedly the driver responsible for driving the employees on the date in question, but was taken ill. I find it curious that this information would not have been adduced by the Employer earlier during the investigation of the complaint and before the Determination was made. I also think that this evidence would likely not qualify as "new evidence" under the fourfold conjunctive test set out in *Re Merilus Technologies Inc.*, BC EST # D171/03, as it is the sort of evidence that could have, with the exercise of due diligence, been discovered and presented to the delegate during the investigation of the complaint and prior to the Determination being made. Notwithstanding, I do not find the statement of Mr. Randhawa challenging the veracity of what Mr. Baghri stated to the Team, nor the delegate's findings of facts and conclusions in the Determination.
30. In the circumstances, I deny the appeal of the Employer.

ORDER

31. Pursuant to section 115 of the *Act*, the Determination dated August 19, 2010, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal