

An appeal

- by -

Pashaura Enterprises Ltd. carrying on business as Surjit Gill Farm
(“Pashaura”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/134

DATE OF DECISION: December 27, 2012

DECISION

SUBMISSIONS

Tony Bhullar

counsel for Pashaura Enterprises Ltd. carrying on business
as Surjit Gill Farm

INTRODUCTION

1. This is an application filed by Pashaura Enterprises Ltd. carrying on business as Surjit Gill Farm (“Pashaura”) pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the “*Act*”) to extend the time period for requesting an appeal of a Determination. In this case, a Determination levying two separate \$500 monetary penalties against Pashaura was issued on October 3, 2012. The time for filing an appeal with the Tribunal, calculated in accordance with section 122 of the *Act*, expired on November 13, 2012. Pashaura’s appeal was filed on November 16, 2012.
2. I am adjudicating this appeal based on the written submissions filed by Pashaura’s legal counsel. In addition, I have reviewed the Determination, the Director’s delegate’s “Reasons for the Determination” (the “delegate’s reasons”), and the subsection 112(5) “record” that was before the delegate when the Determination was made.

BACKGROUND FACTS

3. The two \$500 monetary penalties were levied based on contraventions of subsections 9(2) and 13(3) of the *Act*. These provisions are set out below:
 - 9 (2) A person must not employ a child under 12 years of age without the director’s permission.
 - 13 (3) A person must not engage the services of a farm labour contractor unless the farm labour contractor is licensed under this Act.
4. The penalties were levied following a site visit at Pashaura’s Surrey farm on August 2, 2012. A boy, aged 10 years, was seen harvesting blueberries alongside his mother and older sister. The boy told one of the Director’s investigators that he was working for Pashaura, as were his sister and mother. The boy’s mother confirmed that he was her son and his sister confirmed the boy’s age. The subsection 13(3) contravention relates to a farm labour contractor (“FLC”) whose employees were also harvesting blueberries at the farm. The FLC was not licensed although he did, after the site visit, acquire a FLC licence for the period August 13, 2012 to August 12, 2013.
5. Following the August 2 site visit, the delegate sent a letter to Pashaura, dated August 9, 2012, relating to a possible subsection 9(2) contravention and on August 21, 2012, sent a second letter to Pashaura relating to the FLC matter. In each case, the delegate requested a written response but no written response was ever provided to either letter and, accordingly, the Determination was subsequently issued.
6. The Determination was issued on October 3, 2012, and at the bottom of the second (and last) page of the Determination, a “text box” set out information regarding the appeal process and also indicating that the appeal deadline was November 13, 2012. On November 16, 2012, Pashaura’s legal counsel filed an appeal based on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles

of natural justice in making the Determination (subsection 112(1)(b)). The appeal materials included the Tribunal's Appeal Form and an attached 2-page memorandum of argument. In the latter document, Pashaura's grounds of appeal were more fully particularized as follows:

- “The Director, respectfully, is under the misapprehension that the Appellant must respond to the issuance of a Determination. The Appellant did not respond due to remarks and comments in the reasons for the Determination.” The letter continues: “It is our position that the delegate is biased and therefore no response would change the Director's conclusion.”
- “The Director has failed to provide a scintilla of raw notes or information gathered of witnesses or responses of [the boy's] mother or sister. As far as bew [sic; this should probably read “her”?] evidence, [the boy's] mother is prepared to provide an affidavit under oath that he was not working but taking berries home.”
- “The Appellant operates a large operation and cannot be expected to investigate every FLC is licensed. [sic] Respectfully, it is the responsibility of the Director to issue to every farmer a list of licensed FLC's. [sic] Secondly, Kong does not require to be licensed since his employees were not “under the control or direction of another person.” The Act defines precisely without equivocation what is an FLC.”

THE APPLICATION TO EXTEND THE APPEAL PERIOD

7. As I read Pashaura's legal counsel's submissions, he has advanced four arguments in support of the application. First, he says that the Director would not suffer any prejudice if an extension were granted. Second, he says that the Director has failed to make “full disclosure” regarding “any notes, memoranda, or whom was spoken to at the appellant's farm” and that the case against his client “is based on mere observation and speculation” which he says amounts to “a violation of substantive fairness”. Third, he says he was suffering from some health problems during the relevant time frame. Fourth, he says that “the Appellant has met the test of of [sic] a meritorious case on its face”.

ANALYSIS AND FINDINGS

8. A non-exhaustive list of the factors the Tribunal will consider when adjudicating an application to extend the appeal period was first set out in *Niemisto* (BC EST # D099/96) and these include the length of the delay in filing the appeal, the reason for the delay, whether there was an ongoing *bona fide* intention to appeal, the likely prejudice to other parties if the late appeal were to be adjudicated on its merits, and whether the appeal has some presumptive merit.
9. In the instant case, the delay is slight and I am not persuaded that the Director would suffer any prejudice by reason of the modest delay involved here. That said, in my view, the applicant has not adequately explained why the appeal was not filed within the statutory appeal period. While I recognize that counsel has stated he was dealing with some health issues during the time in question, I also note that, as recorded in the delegate's reasons, Pashaura's legal counsel spoke with the delegate by telephone on September 10, 2012, regarding this matter and, at that time, counsel indicated that he would be appealing any determination that might be issued. As matters transpired, the Determination was issued (on October 3, 2012) and an appeal of that Determination was subsequently filed with the Tribunal, but a few days after the deadline. I have nothing before me explaining how counsel's health issues caused him to file a late appeal. I might also add that since counsel knew in mid-September 2012 that a Determination would likely be issued, he could have made other arrangements to ensure that a timely appeal was filed.

10. As for the alleged “lack of disclosure”, I am a bit puzzled as to what further disclosure might have been called for in this case. Section 77 of the *Act* states: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.” The record before me shows that the delegate wrote to Pashaura on August 9, 2012, and in this letter he set out the details relating to the possible “child labour” contravention. On August 21, 2012, the delegate wrote a second letter in which he set out, again in some detail, the particulars relating to a possible subsection 13(3) contravention. Pashaura, and then later its legal counsel, were both invited to provide a response, in writing, to the allegations and were given until September 14, 2012, to do so but no written response was ever provided. In my judgment, the delegate fully complied with his section 77 obligation.
11. I now come to the most problematic aspect of this application, namely, whether this appeal has any merit. In my view, it does not.
12. As previously noted, the appeal is predicated on two grounds, namely, error of law and an alleged breach of the principles of natural justice. With respect to the latter ground, I have already found that the delegate adequately complied with his section 77 obligation. Counsel also seemingly suggests that there was a breach of the principles of natural justice because the delegate was “biased” and that the Determination “is based on mere observation and speculation”.
13. The bias allegation is completely without factual foundation and, indeed, is based on a misstatement in relation to the delegate’s reasons. Counsel asserts that the delegate was biased because “on page one (1) of the reasons the delegate states that ‘this is a common practice’ in reference to allegation [sic] that a child under 12 years of age was harvesting berries for Pashaura”. The actual text of the delegate’s reasons in relation to this allegation are as follows:

... When [the boy] was approached to be interviewed by the [Agriculture Compliance] Team, he was observed hand harvesting blueberries, along with other employees of Pashaura. While the Team was interviewing [the boy], [he] continued to harvest blueberries. It was observed that [the boy’s] mother was hand harvesting blueberries opposite to [her son] in the same row. [The boy’s] sister was observed hand harvesting blueberries beside [her brother]. Other employees of Pashaura were hand harvesting blueberries in this manner as well; this is typical practice for farm workers when harvesting blueberries. When [the boy] was interviewed, he stated he worked for Pashaura, as did [the boy’s] mother and sister. [The boy’s] mother confirmed that she was in fact his mother and the girl picking beside him was [the boy’s] older sister. [The boy’s] sister confirmed his birth date and age to the Team. [my underlining]
14. I do not read the delegate’s reasons as suggesting that it is a “common practice” for children under the age of 12 years to be hired to harvest blueberries. Rather, I think the only reasonable inference to be drawn from the above underlined portion of the delegate’s reasons is that the three berry pickers – the boy, his mother and sister – were positioned in the berry rows in a manner that is typical when blueberries are being hand harvested by employed blueberry pickers. Of course, this interpretation tends to undermine counsel’s assertion that the boy was not working as a berry picker but, rather, was merely “tagging along” with his mother and sister and picking berries for his own and/or his family’s personal consumption. I shall return to this allegation later on in these reasons.
15. As for counsel’s assertion that the Determination was “based on mere observation and speculation”, I would first note that there is absolutely nothing improper about the delegate relying on the observations made by the compliance team members. Evidence is no less credible or probative simply because it is “observational” in nature rather than, say, in the form of a document. Further, the delegate was entitled to draw reasonable inferences from the evidence, including the observation that the boy was picking blueberries in the same

manner as an ordinary employee. It was hardly speculative for the delegate to conclude, especially in light of the admissions made by the boy, his mother, and his sister, that the boy was undertaking “work” as that term is defined in the *Act*.

16. Pashaura does not dispute the fact that the boy in question was under 12 years of age nor does it say that it had the Director’s authorization regarding his employment. Pashaura’s position on appeal apparently is that the delegate erred in law in concluding that the boy was an “employee” since he was only picking blueberries for his own and/or his family’s personal consumption. This argument depends, in large measure, on one taking a different view of the facts and while an error in regard to a finding of fact can constitute an error of law, that can only be so if the disputed factual finding is wholly unreasonable. I note that the boy himself admitted, when questioned, that he was working for Pashaura; neither his mother nor sister expressed a contrary view. On August 9, 2012, the delegate wrote to Pashaura setting out his preliminary position that the boy was unlawfully working at the farm and Pashaura did not dispute that position although it was invited to do so. Counsel now says that the boy’s mother is prepared to swear an affidavit that, in fact, the boy was not working but simply picking blueberries “to take home”. There is no such affidavit before me and even if there were, the affidavit would be inadmissible given the strict test for “new evidence” set out in *Davies et al.*, BC EST # D171/03.
17. Finally, I turn to Pashaura’s arguments regarding the subsection 13(3) FLC contravention. Firstly, Pashaura’s legal counsel has not identified any provision in the *Act* that obliges the Director of Employment Standards “to issue to every farmer a list of licensed FLC’s”. It is the farmer’s obligation to ensure that they are dealing with a properly licensed FLC – and this is not a complicated task; all that is required is for the farmer to ask to see the FLC’s licence. I expect the entire procedure would take about 15 seconds of the farmer’s time. It is in the farmer’s economic interest to ensure that any FLC they are dealing with is properly licensed in order to avoid any potential unpaid wage liability that might be imposed on the farmer under subsection 13(2) of the *Act*.
18. Secondly, Pashaura seemingly suggests that the FLC in question, Nhand Kong, was not, in fact, an FLC who was required to be licensed since his “employees were not ‘under the control or direction of another person’” (underlining in original submission). A FLC is defined in section 1 of the *Act* as follows: “*farm labour contractor* means an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product.” The evidence recounted in the delegate’s reasons indicates that Mr. Kong’s employees were working “for” Pashaura in the capacity as berry pickers at Pashaura’s Surrey farm. Mr. Kong was undeniably a FLC and this is further buttressed by the fact that he immediately obtained a FLC licence when it was drawn to his attention that he was acting as a FLC for Pashaura.
19. To summarize, I do not find Pashaura’s explanation for its late appeal to be particularly compelling and, more importantly, its appeal strikes me as having no merit whatsoever. Accordingly, I am refusing its subsection 109(1)(b) application to extend the appeal period and, in consequence, am also dismissing its appeal.

ORDER

20. Pashaura's application under subsection 109(1)(b) of the *Act* to extend the appeal period is refused. Pursuant to subsections 114(1)(b) and (f) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal