

An appeal

- by -

GDMK Enterprises Ltd.
("GDMK")

- 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: Carol L. Roberts

FILE No.: 2011A/160

DATE OF DECISION: December 9, 2011

DECISION

SUBMISSIONS

Baldev Sandhu, Barrister & Solicitor

counsel for GDMK Enterprises Ltd.

Ravi Sandhu

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by GDMK Enterprises Ltd. (“GDMK”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued September 15, 2011.
2. GDMK is a licensed farm labour contractor as defined by section 1 of the *Act*. After conducting a worksite visit, the Director’s delegate determined that GDMK had contravened sections 6(1)(f) and 6.1 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to file with the Director an up-to- date list of all vehicles used for transporting farm workers, and in failing to post a notice within the vehicle respecting vehicle and passenger safety requirements. As this was GDMK’s third contravention of each of the sections, the Director imposed a \$10,000 administrative penalty for each contravention, for a total administrative penalty of \$20,000.
3. GDMK says that the Director’s delegate erred in law and failed to observe the principles of natural justice in making the Determination and seeks to have the Determination varied or cancelled. GDMK also sought a suspension of the Determination under section 113 of the *Act*. GDMK deposited no money with the suspension application.
4. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although GDMK seeks an oral hearing, I conclude that this appeal can be adjudicated on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

5. The issues on appeal are whether the delegate erred in law or failed to observe the principles of natural justice in concluding that GDMK had contravened sections 6 (1)(f) and 6.1 of the *Regulation*; and whether or not the suspension application should be granted.

FACTS AND ARGUMENT

6. GDMK’s farm labour contractor licence was issued April 8, 2010. As part of the licensing process, GDMK was required to pass a written exam in order to satisfy the Director of its knowledge of the *Act* and *Regulation*. In addition, farm labour contractors are taken through an interview checklist to ensure their understanding of the requirements of the *Act* and *Regulation*.

7. On August 25, 2011, the Employment Standards Branch Agricultural Compliance Team conducted a worksite visit at J & S Farms Inc. (J & S). Information was disclosed that GDMK had provided J & S with 5 employees as contract labour for harvesting blueberries. During the visit, the inspectors discovered that GDMK had used a vehicle to transport employees to the work location. Arshdeep Lalli confirmed that the vehicle belonged to GDMK and that she had used it to transport workers to J & S. Further investigation disclosed that the vehicle was registered to Gurpartap Dhillon, the owner of GDMK. The inspectors further discovered that not only was the vehicle not registered with the Director, it did not contain a notice inside it, provided by the Director, respecting vehicle and passenger safety requirements.
8. On September 1, 2011, a delegate of the Director sent GDMK a letter providing it with an opportunity to respond to the observations made during the work site visit. Any response was to be provided in writing, along with any supporting documents, by September 12, 2011. On September 12, 2011, Mr. Dhillon faxed a response to the Branch. In that letter, he stated that the vehicle in question was not registered under the company name and that it was only used for private use. He stated that because the vehicle was only used for private use, it did not need to be registered with the Director or meet the safety requirements by having a notice posted within it. Mr. Dhillon also said that Ms. Lalli had borrowed his vehicle on August 25, 2011, for personal reasons.
9. The delegate found that GDMK used a vehicle used to transport workers to J & S which had not been registered the Branch at the time of the site visit, in contravention of section 6(1)(f) of the *Regulation*. The delegate found Mr. Dhillon's response that the vehicle was only for private use rather than business purposes insufficient. The delegate noted that Ms. Lalli had confirmed that she had transported employees to the work site using that vehicle and that the vehicle belonged to GDMK. The delegate further noted that the vehicle registration papers confirmed that the vehicle was registered to Mr. Dhillon.
10. The delegate found that it was GDMK's responsibility to file with the Director an up-to-date list of registration and license plate numbers for all vehicles used to transport workers and that GDMK had failed to do so. The delegate found that GDMK had contravened section 6(1)(f) of the *Regulation*.
11. The delegate also found Mr. Dhillon's statement that the vehicle was only used for private use and therefore did not need to meet safety requirements by posting a notice provided by the Director respecting vehicle and passenger safety requirements to be inadequate on the basis that Ms. Lalli had confirmed that the vehicle had been used to transport employees to J & S. The delegate concluded that GDMK had contravened section 6.1 of the *Regulation* in failing to have the required notice.
12. The delegate found that GDMK had been found to be in contravention of section 6(1)(f) and 6.1 of the *Regulation* on July 15, 2009, and that a \$2,500 penalty had been imposed for each of those contraventions. The delegate found that GDMK had contravened section 6(1)(f) and 6.1 for a third time within 3 years of the most recent contravention and that an escalation of the penalties was in order.
13. On appeal, counsel says that one of GDMK's workers, Ms. Lalli, borrowed Mr. Dhillon's personal vehicle for her own personal use because her daughter was sick and she wanted to leave work early. Ms. Lalli, her husband's parents, brother's wife and cousin all work for GDMK and on August 25, 2011, Ms. Lalli picked up her relatives and drove them to their work site. Counsel says that this was the only time Ms. Lalli did so. The workers were driven back to their residence by Harpreet Gill, who is a driver of GDMK, in a GDMK van in which the notice is displayed.
14. Counsel submits that GDMK filed with the Director an up to date list of all vehicles used for transporting farm workers and that the vehicle Ms. Lalli used was not registered with the Director because it was not used

to transport workers. Counsel says that it is impossible for GDMK to post a notice in the vehicle if it was not registered with the Director and given a notice to post.

15. Counsel further submits that the Director failed to conduct a complete investigation by not gathering all the information from all of the sources. Counsel seeks an opportunity to “present its appeal at a full hearing” and that GDMK “intends to call some witnesses to bring forth relevant cogent evidence that will assist in resolving the issues in this appeal”.
16. Finally, counsel submits that the penalty assessment is “very high and unjust”.
17. The delegate submits that GDMK’s arguments on appeal are the same arguments that were presented to, and considered by, the delegate before the Determination was issued. The Director notes that the facts that led to a finding of a contravention are undisputed and that GDMK is simply providing an explanation for the facts. The Director says it has no reason to question GDMK’s explanation, but contends that the facts nevertheless establish that the *Regulation* were contravened. The Director further notes that the administrative penalty is mandatory and the Director has no discretion on the amount of that penalty. The Director seeks to have the Determination upheld and the appeal denied. The Director made no submissions on the suspension application.
18. In a reply submission, counsel contends that the arguments presented on appeal are not the same as those presented to the Director before the Determination was made. GDMK says that it did file with the Director an up-to-date list of all vehicles used for transporting farm workers, and that Mr. Dhillon’s personal vehicle was used on one occasion by Ms. Lalli to drive her relatives to the work place.

ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
20. The burden of establishing the grounds for an appeal rests with an Appellant. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.
21. I am not persuaded that the appeal has merit. There is nothing in the appeal submission that is substantively different than what was provided to the delegate.
22. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
 1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle

23. Although GDMK submits that the Director erred in law, there is nothing in the appeal submissions that establishes a reviewable error of law.
24. Section 6(1)(f) of the *Regulation* provides that a farm labour contractor must do all of the following:
- (f) file with the director
 - (i) an up-to-date list of the registration numbers and licence numbers of each vehicle used by the farm labour contractor for transporting employees and
 - (ii) if the vehicle is owned by the farm labour contractor, copies of the inspection certificate and other records that must be maintained under section 25 of the Motor Vehicle Act Regulations.
25. Section 6.1 of the *Regulation* provides as follows:
- 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 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 visible to the driver or operator of the vehicle and employees riding in the vehicle.
26. The facts found by the Director are not disputed. The Director found a contravention of the *Regulation* based on those facts. I find no error in the Director's application of those regulatory provisions.
27. I am also unable to find that the Director failed to observe the principles of natural justice in making the Determination. The Director advised GDMK of the investigation team's observations during the site inspection and offered it an opportunity to respond to those observations. Mr. Dhillon faxed in a letter, which the Director considered before issuing the Determination. Mr. Dhillon acknowledged the contravention and offered an excuse for the contravention that the delegate considered insufficient. Given that Ms. Lalli's relatives were also employees of GDMK and that they were transported to the work site using a vehicle that was not registered with the Director, I find no basis to conclude that the Determination was in error.
28. Although GDMK now says that the Director failed to gather all relevant information, counsel does not say what that relevant evidence is, nor does counsel indicate who the witnesses are or what they would say. Mr. Dhillon had an obligation to present to the Director all information he felt relevant to the issue when afforded the opportunity to respond. The Tribunal has repeatedly stated that an appeal is not an opportunity to provide information that ought to have been provided to the Director during the investigation.
29. GDMK also says that the penalty assessment is unfair. In *Douglas Mattson* (BC EST # RD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is "fair" or "logical". Further, in *Acton Super-Save Gas Stations Ltd.* (BC EST # D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme."
30. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by *Regulation*. I find no error in the Director's conclusion and dismiss the appeal.

31. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.* BC EST # D420/97; *TNL Paving Ltd.* BC EST # D397/99) In light of my decision on the merits, there is no basis to order a suspension of the Determination.

ORDER

32. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 15, 2011, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal