

An appeal

- by -

Harsun Contracting Ltd.
("Harsun")

- 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.: 2016A/132

DATE OF DECISION: December 20, 2016

DECISION

SUBMISSIONS

Paramjit Brar

on behalf of Harsun Contracting Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Harsun Contracting Ltd. (“Harsun”) has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 15, 2016.
2. The Determination found that Harsun had contravened sections 6(1)(a), 6(1)(d), 6(1)(f) and 6.1 of the *Employment Standards Regulation* (the “*Regulation*”):

Duties of farm labour contractors

- 6** (1) A farm labour contractor must do all of the following:
- (a) carry the farm labour contractor’s licence at all times while carrying on the licensed activities and display a copy of the licence prominently on all vehicles used for transporting employees;
 - ...
 - (d) display prominently at the site where the work is to be performed, and on all vehicles used by the farm labour contractor for transporting employees, the wages the farm labour contractor is paying to employees;
 - ...
 - (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.

...

Additional duties of farm labour contractors — posting safety notices in vehicles

- 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 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.
3. Pursuant to section 29 of the *Regulation*, the Determination ordered Harsun to pay an administrative penalty in the amount of \$500.00 for breach of each of the above delineated sections of the *Regulation* for a total of \$2,000.00.

4. Harsun's appeal alleges the Director failed to observe principles of natural justice in making the Determination.
5. In correspondence dated September 22, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any of them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.
6. The section 112(5) "record" (the "Record") was provided to the Tribunal by the Director on September 30, 2016, and a copy of the Record was delivered to Harsun, who was given the opportunity to object to its completeness. Harsun did not file an objection and, accordingly, the Tribunal accepts it as complete.
7. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the Appeal and written submissions of Harsun and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director will be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

8. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect that Harsun's appeal can succeed.

THE FACTS

9. On February 26, 2015, Harsun was issued a Farm Labour Contractor ("FLC") licence under the *Act* permitting it to employ a maximum of 74 employees. The licence was subsequently amended on August 14, 2015, to increase the maximum number of workers to 134. The licence is set to expire on February 25, 2018.
10. As part of the FLC licencing process, applicants are required to pass a written examination to satisfy the Director with their knowledge of the *Act* and *Regulation*. Also, as part of the licencing process, applicants are taken through an application checklist to ensure their understanding of their obligations under the statutory regime, including sections 6(1)(a), 6(1)(d), 6(1)(f) and 6.1 of the *Regulation*. Paramjit Kaur Brar ("Ms. Brar"), a director and officer of Harsun, successfully completed the examination and fulfilled the licencing requirements.
11. On June 21, 2016, the Agricultural Compliance Team of the Employment Standards Branch (the "Team") conducted a roadside inspection in conjunction with Commercial Vehicle Safety and Enforcement ("CVSE") and Worksafe BC. During this roadside inspection, the Team inspected two vehicles. The first vehicle with the licence plate KD4322 ("vehicle KD4322") was driven by Gurpreet Sidhu ("Ms. Sidhu"). I note that the Determination identifies the driver of the vehicle as Mr. Sidhu but Harsun, in its appeal submissions, identifies this as an error on the part of the Director as the driver of vehicle KD4322 was the same named driver – Gurpreet Sidhu – but a female. This seems to be an error in the Determination as the delegate of the Director who wrote the Determination is different than the one who was involved in the investigation and who prepared the preliminary assessment based on the Team's inspection findings. I do not think anything turns on this error.

12. Ms. Sidhu identified the vehicle as Harsun's and she stated she was transporting 13 farm workers to harvest blueberries at Golden Eagle Farms worksite on Neaves Road in Pitt Meadows, British Columbia. The Team observed that Harsun did not have a wage rate notice or copy of the FLC licence listed anywhere on the vehicle KD4322. Ms. Sidhu informed the Team that she was not aware of the requirement to post the FLC licence or wage rate notice on the vehicle.
13. The second vehicle the Team inspected had license plate number KD4324 ("vehicle KD4324"). This vehicle was driven by Jagjit Brar ("Mr. Brar"). Mr. Brar also identified the vehicle as one of Harsun's. He said that he was transporting 20 farm workers to harvest blueberries at the Gold Eagles Farms on Neaves Road in Pitt Meadows, British Columbia. The Team observed that neither a wage rate notice nor a copy of the FLC licence was displayed anywhere on vehicle KD4324. The Team also observed that a safety notice required to be displayed pursuant to section 6.1 of the *Regulation* was also not posted anywhere in the vehicle. Mr. Brar informed the Team that he was aware of the requirements to post the FLC licence, the wage rate notice and the safety notice in the vehicle, but, he had been waiting for Ms. Brar to give him the notices to post and, at the time, she had not yet done so.
14. On June 21, 2016, Harsun hand delivered to the Langley office of the Employment Standards Branch (the "Branch") up to date registration numbers for vehicles KD4322 and KD4324 together with registration numbers for 4 other vehicles. However, Harsun failed to file with the Director an inspection certificate that must be maintained under section 25 of the *Motor Vehicle Act Regulations* for any of its vehicles.
15. On July 7, 2016, a delegate of the Director issued Harsun a letter (the "Letter") noting the Team's observations at the roadside inspection on June 21, 2016. In the Letter, the delegate included his preliminary assessment that Harsun may be in contravention of sections 6(1)(a), 6(1)(d) and 6.1 of the *Regulation* for failing to have its FLC licence or a wage rate notice posted in vehicles KD4322 and KD4324 and a safety notice posted in vehicle KD4234. The delegate also noted in the Letter that Harsun may be in contravention of section 6(1)(f) of the *Regulation* for not having filed with the Director inspection certificates for vehicles KD4322 and KD4324. The delegate invited Harsun to respond to the Team's observations and his preliminary assessment.
16. On July 11, 2016, Ms. Brar responded to the Letter by email. She indicated in the email that the FLC licences for vehicles KD4322 and KD4324 were in the glove box of the respective vehicles and Harsun informs its drivers of the location of the FLC licence. She also stated that the wage rate notices in both vehicles, at the time of the roadside inspection on June 21, 2016, were older but Harsun has posted "newer" copies of the notices in the vehicles since. Furthermore, with respect to vehicle KD4324, she stated that the vehicle safety notice has "always" been posted in the vehicle and at the time of the roadside inspection there were two copies of the safety notice posted in the said vehicle.
17. With respect to inspection certificates for both vehicles, KD4322 and KD4324, Ms. Brar submitted that she personally dropped off valid vehicle inspection certificates at the Langley office of the Branch along with inspection certificates for other vehicles operated by Harsun. However, the delegate notes in the Determination that on July 25, 2016, when Ms. Brar delivered to the Branch up-to-date registration numbers of three other vehicles operated by Harsun, she informed Ms. Brar that Harsun had still not submitted to the Director inspection certificates for any of its vehicles currently registered with the Director. The delegate states Ms. Brar responded that she would submit the inspection certificates to the Director as soon as possible but as at the date of the Determination, Harsun had not yet filed with the Director any of the inspection certificates for the vehicles Harsun uses to transport employees, including vehicles KD4322 and KD4324.

18. In finding that Harsun contravened section 6(1)(a) of the *Regulation*, the delegate reasoned that keeping an FLC licence in the glove box of the vehicle Harsun used for transporting its employees did not meet the requirements of the *Regulation* of prominently displaying the licence on the vehicle. Furthermore, the delegate noted that the drivers of the vehicles in question did not offer to produce a copy of the FLC licence from the glove box for immediate posting on the vehicle.
19. The delegate also found that Harsun breached section 6(1)(d) of the *Regulation* for failing to prominently display, on both vehicles inspected by the Team, the wages it was paying its employees. In making this determination, the delegate noted that in her letter of July 11, 2016, Ms. Brar referred to older wage rate notices being replaced with “newer” copies in vehicles KD4322 and KD4324 but did not respond to the Team’s observations that there was no wage rate notice posted anywhere in either of these vehicles at the time of the roadside inspection on June 21, 2016. Furthermore, the delegate noted that at the time of the inspection, the driver of the vehicle KD4322, Ms. Sidhu, stated she was unaware of the requirement to have a wage rate notice posted in the vehicle, and the driver of vehicle KD4324, Mr. Brar, stated he was still awaiting for Ms. Brar to give him the wage rate notice along with other notices to post in the vehicle.
20. The delegate also found that Harsun breached section 6(1)(f) of the *Regulation* for failing to file an inspection certificate for both vehicles KD4322 and KD4324. In so concluding, the delegate noted that in her letter of July 11, 2016, although Ms. Brar stated she hand delivered to the Branch copies of the inspection certificates for the vehicles KD4322 and KD4324, the only documents the Branch received from her were copies of the up-to-date registration numbers for these vehicles and others Harsun used to transport employee but no inspection certificates for any vehicles. Furthermore, on July 25, 2016, the delegate notes that she spoke with Ms. Brar and informed her that the Director was not in receipt of any valid inspection certificates for any of Harsun’s vehicles currently registered with the Director and Ms. Brar responded that she would file copies of the inspection certificates with the Director as soon as possible. However, the delegate notes in the Determination that as at the date of the Determination the Director had not received any inspection certificates for Harsun’s vehicles.
21. Finally, the delegate also found Harsun breached section 6.1 of the *Regulation* for failing to post a safety notice in vehicle KD4324 the Team inspected. More particularly, the delegate notes in the Determination that while Ms. Brar, in her email of July 11, 2016, indicates that a vehicle safety notice was “always” posted in vehicle KD4324 and Harsun ensured that two copies of the safety notices were posted in all of its vehicles; this contradicts the statement of the driver of vehicle KD4324, Mr. Brar, who stated that he was aware of the requirement to post the safety notice in the vehicle but Ms. Brar had not given him any notices to post in the vehicle. The delegate also notes that the Team observed no safety notice posted in vehicle KD4324 at the time of the inspection on June 21, 2016.
22. In the circumstances, the delegate concluded that Harsun breached sections 6(1)(a), 6(1)(d), 6(1)(f) and 6.1 of the *Regulation* and levied a mandatory administrative penalty of \$500.00 for each said breach against Harsun for a total of \$2,000.

SUBMISSIONS OF HARSUN

23. In her written submissions on behalf of Harsun, Ms. Brar states that the Farm Labour Contractor Licence “was in the glove box along with the insurance papers” and “the officer who checked the vehicle did not ask for it”. She further states that the examination she wrote as part of the FLC licencing process, in question 3, does not state in the Punjabi interpretation, the requirement to “display” the Farm Labour Contractor’s licence.

24. She further states that the “only ting [sic] that was missing” when the Team inspected the two vehicles of Harsun was the “wage rate paper” but the officer who inspected Mr. Sidhu’s vehicle advised her that “it’s just a minor thing and there won’t be any fines” and that she should “post it in the vehicle as soon as possible” because there may be a fine in the future.
25. With respect to inspection certificates for the vehicles in question, she states that “[v]ehicle inspections and all was passed no issues” [sic]. She further submits that this is the first time ever that this has happened to Harsun and it was at “the very beginning of the season”.
26. She also submits that the driver of the vehicle KD4322 who has been referred to in the Determination as Mr. Sidhu is actually a female, Ms. Sidhu.

ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal the determination on the following grounds:
- (a) the Director erred in law;
 - (b) the Director failed to observe the principles of natural justice in making the determination; and
 - (c) evidence has become available that was not available at the time the determination was being made.
28. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.
29. As indicated above, Harsun’s appeal is based on the “natural justice” ground of appeal in section 112(1)(b). Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker (see *Re: Imperial Limousine Services Ltd.*, BC EST # D014/05).
30. I find nothing in the appeal submissions of Ms. Brar that remotely suggests a breach of natural justice on the part of the Director in making the Determination. To the contrary, I am satisfied that Harsun was afforded all procedural rights contemplated within the meaning of “natural justice”. In particular, after the Team’s investigation on June 21, 2016, the Director, on July 7, 2016, issued Harsun the Letter which set out unequivocally the Team’s observations at the roadside inspection on June 21, 2016. Included in the Letter is also the Director’s preliminary assessment indicating that Harsun may be in contravention of sections 6(1)(a), 6(1)(d), 6(1)(f) and 6.1 of the *Regulation*. The Letter also invited Harsun to respond to the Team’s observations and the Director’s preliminary assessment which Ms. Brar did by way of her email of July 11, 2016. Therefore, I find that Harsun was not only afforded an opportunity to know the case against it but was provided an opportunity to and responded to the case against it. There is also no allegation of or any evidence of bias on the part of the Director in making the Determination. Therefore, I do not find there to be any basis, under the natural justice ground of appeal, to interfere with the Determination and I dismiss the natural justice ground of appeal.
31. Having said this, I have also considered the error of law ground of appeal, although not advanced by Harsun in its appeal. In *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defines error of law inclusively as follows:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

32. In this case, I do not find any evidence of an error of law as defined in *Gemex, supra*. On the contrary, I find that the delegate not only correctly interpreted and applied sections 6(1)(a), 6(1)(d), 6(1)(f) and 6.1 of the *Regulation* but there was ample evidence to support all of the conclusions the delegate reached in the Determination. I do not find anything in Ms. Brar's submissions that would suggest otherwise. I note, in particular, in respect of the delegate's conclusion that Harsun contravened section 6(1)(a) of the *Regulation*, Ms. Brar states that the Farm Labour Contractor's licence was in the glove box of Harsun's vehicles and the officer who checked the vehicle did not ask for it. Section 6(1)(a) of the *Regulation* requires that the labour contractor's licence to be displayed prominently on all vehicles of the Farm Labour Contractor used for transporting employees. If Farm Labour Contractor's licences were in the glove boxes of the vehicles as Ms. Brar contends then they were not prominently displayed and it is not the responsibility of the officer who was involved in the inspection of the vehicle to ask the driver to produce it. I also find compelling the evidence of the Team involved in the inspection, namely, that one of the drivers was not aware of the requirement to post the FLC licence or the wage rate notice on the vehicle and the other one said that he was waiting for Ms. Brar to give him the notices to post and that she had not done so at the time the inspection was conducted.

33. I also find Ms. Brar's assertion that the Punjabi version of the question 3 on the written examination she wrote as part of the FLC licencing process did not indicate that FLC contractor's licence needed to be displayed anywhere to be without any merit. While I do not read Punjabi, the English version of question 3, immediately above the Punjabi version, clearly mentions the requirement to display a copy of the licence prominently on all vehicles used for transporting employees. I note Ms. Brar does not say she does not read or understand English. It is also noteworthy that Ms. Brar's appeal submissions on behalf of Harsun are in English and not in Punjabi. I also note that Harsun's Application for Farm Labour Contractor Licence (the "Application") Ms. Brar submitted on February 26, 2015, is in English. It is also noteworthy that under the requirement bond, at page 5 of the Application, above her signature, Ms. Brar represents as follows:

I agree to operate in compliance with all provisions of the *Employment Standards Act* and *Regulation*.

Therefore, whether or not the Punjabi version of the question on the exam Ms. Brar wrote in the FLC licencing process made reference to the requirement to display the FLC licence, the *Regulation* in section 6(1)(a) clearly does and this requirement was breached by Harsun.

34. With respect to the requirement in section 6(1)(d) that the FLC must display prominently at the site where the work is to be performed and, on all vehicles used by the FLC for transporting employees, the wage the FLC is paying to employees, Ms. Brar admits in the appeal that this document was missing in Harsun's vehicles. However, she submits that Ms. Sidhu was informed by the inspecting officer that this was "just a minor thing and there won't be any fines" for this contravention. It is curious that Ms. Brar, in her July 11, 2016, email, in response to the Letter from the delegate containing the preliminary assessment, does not mention the alleged representation of an officer to Ms. Sidhu. I find this new piece of information not only inadmissible under the test for "new evidence" delineated by the Tribunal in *Re: Merilus Technologies* (BC EST # D171/03) but also incredible and unbelievable.

35. With respect to the Director's conclusion that Harsun breached section 6(1)(f) of the *Regulation* for failing to file copies of inspection certificates of vehicles KD4322 and KD4324, Ms. Brar simply states in the appeal submissions that "[v]ehicle inspections and all was passed, no issues" (sic). However, she never produced copies of inspection certificates for the said vehicles, although she represented to the delegate, on July 25, 2016, that she would submit inspection certificates. I note she has not produced copies of inspection certificates in the appeal either which begs the question whether they ever existed.
36. Finally, I note that Ms. Brar submits that this is the first time that Harsun finds itself in this situation and it all happened at the "very beginning of the season". I am neither moved by these submissions nor do I find them relevant in the circumstances. The *Act* and the *Regulation* do not excuse breaches because they are "first time" breaches or they happened at the "very beginning of the season".
37. In the circumstances, I find there is no reasonable prospect that this appeal can succeed and I dismiss it.

ORDER

38. Pursuant to section 115 of the *Act*, I confirm the Determination issued on August 15, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal