

An appeal

- by -

Jagir Enterprises Ltd.

- 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: John Savage

FILE No.: 2005A/181

DATE OF DECISION: December 8, 2005

DECISION

SUBMISSIONS

Sarbjit Shergill, for the Employer, Jagir Enterprises Ltd.

Ravi Sandhu, for the Director of Employment Standards

OVERVIEW

1. Jagir Enterprises Ltd. (“Jagir”) is a farm labour contractor. Jagir appeals the Determination of the Director dated September 9, 2005 that it contravened Section 6 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “Regulation”).
2. The Employment Standards Branch Agricultural Compliance Team (the “Team”) conducted a site visit to Bob Featherstone Farms on August 9, 2005. Jagir was providing contract labour to Bob Featherstone Farms. The purpose of the visit was to ensure compliance with the *Employment Standards Act* and Regulation. The Director considered two breaches of the Regulation.
3. Section 6(1)(f) of the Regulation requires that a farm labour contractor file with the director an up to date list of the registration numbers and licence numbers of each vehicle used to transport employees. The Director considered whether information on a vehicle used to transport employees was not filed.
4. Section 6(4) of the Regulation requires that a farm labour contractor keep at the work site a daily log. The Team interviewed all of the thirteen employees on site and was unable to obtain the daily log.
5. The Employment Standards Branch wrote a letter to Jagir outlining its findings and requesting a response. An oral interview ensued and there was a further written submission received.
6. The Delegate concluded that there was a breach of section 6 of the Regulation.
7. As this was a second infraction under the Regulation an administrative penalty of \$2500 was imposed pursuant to section 29 of the Regulation.
8. Jagir appeals the Determination of the Director saying that (1) the Director is mistaken as its agent faxed the necessary information to the Director, and (2) the daily log was in a vehicle that had gone to the neighbouring farm while the employee had lunch.
9. With the appeal Jagir has appended a fax cover page with three pages of vehicle information and a daily log. It says that the Director breached the principles of natural justice and the Tribunal should receive this new evidence to make its determination. The appeal also raises, in my view, the issue of whether the Director correctly interpreted the provisions of the Regulation.
10. The Tribunal determined to hear the appeal by written submissions.

ISSUES

11. The appeal raises the following issues:
 - (a) Should new evidence be admitted by the Tribunal pursuant to section 112 of the *Employment Standards Act*?
 - (b) Did the Director err in law or breach the principles of natural justice in finding a contravention of Section 6 of the Regulation?
 - (c) Did the Director err in law in the interpretation of the phrase “must keep at the work site” in Section 6(4) of the Regulation?

LEGISLATION

12. Section 112 of the *Employment Standards Act* provides for an appeal on the basis that the director erred in law, failed to observe the principles of natural justice, or that evidence has become available that was not available at the time the determination was made.
13. Section 6(1)(f) and 6(4) of the Regulation are as follows:
 - 6 (1) 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.
 - (4) A farm labour contractor must keep at the work site and make available for inspection by the director a daily log that includes
 - (a) the name of each worker,
 - (b) the name of the employer and work site location to which workers are supplied and the names of the workers who work on that work site on that day,
 - (c) the dates worked by each worker,
 - (d) the fruit, vegetable, berry or flower crop picked in each day by each worker, and
 - (e) the volume or weight picked in each day by each worker.

DISCUSSION AND ANALYSIS

A. *Admission of New Evidence*

14. The Director considered whether there was a breach of Section 6(1)(f) of the Regulation requiring that vehicle registration numbers be filed. As described by the Delegate the issue arose in the following context.

15. At the time the Team attended on August 9, 2005 at the work site a White GMC van with plate number 7410 JF was seen leaving the work site. An Employment Standards Officer approached the vehicle and spoke to the driver. The driver said he was only at the farm to drop off something and did not work for the farm labour contractor. The farm owner subsequently advised the officer that the vehicle was used by the farm labour contractor and workers were transported to the site in that vehicle.
16. A letter was written to the farm labour contractor on August 15, 2005 requesting a response to this evidence. On August 26, 2005 in a telephone conversation Sarbjit Shergill stated there was no vehicle on site. She was advised that an ICBC search was done on the licence plate and it was registered to Jagir. Shergill asked for and received an extension to respond. On August 29, 2005 a letter was hand delivered asserting that the vehicle registration had been faxed to the Employment Standards Branch in July 2005. A search of Employment Standards Branch records failed to find any such document or evidence of its receipt.
17. Based on this evidence the Delegate made the following observation:

“Section 6(1)(f) of the Regulation requires a farm labour contractor to file up-to-date vehicle registration and license numbers for each vehicle used to transport employees. The employer argument is that the vehicle registration was faxed to the Branch in early July 2005. However, according to our records no vehicle registration was faxed into the Branch from Jagir and Jagir has failed to provide any documentation such as a faxed confirmation sheet to substantiate their claim.”
18. With the appeal Jagir appended a letter dated September 13, 2005 addressed to the Ministry of Labour Board together with three vehicle registrations.
19. The author of the letter, a Customer Representative of Active Insurance and Financial Management Ltd., Meena Sidhu, states that Licence and Vehicle Registrations were faxed on July 14, 2005: “I, Meena Sidhu, hereby confirm that I had faxed the Licence and Vehicle Registration....” Enclosed with the letter are three vehicle registrations stamped with a mark saying “Faxed” and a hand written date.
20. In its submission to the Director on August 29, 2005 Ms. Sarbjit Shergill said “This time also in my presence all documents were faxed to you by Mt Tarlok T’handi of Active Insurance as early as in July 2005”. Based on this evidence it is argued that the required information was “filed with the Director”.
21. The Director says that a search of its records failed to find any evidence that it received the documents. The Director notes that the document supplied do not include a fax header confirming the transmission of the fax. I note that under the section 18 of the *Electronic Transactions Act*, S.B.C. 2001, c. 10 information in an electronic record is sent when it enters an information system outside the control of the originator and deemed received when it is capable of being received. The new evidence does not directly address these matters.
22. In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal: (1) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value, in the sense that, if

believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue.

23. The evidence sought to be led could be described as, to some degree, confirmatory of the evidence provided during the investigation. Such evidence in general is not to be admitted if it was available to be presented earlier during the investigation: *Re Big Olive Taverna Ltd.*, [2000] BC EST #D440/00.
24. In my opinion, however, even if this evidence is credible, and met the other threshold tests, there is another fundamental reason why the evidence should not be admitted. It is not material to the appeal.
25. A careful reading of the Determination shows that the Delegate made no finding on whether there had been a breach of Section 6(1)(f). The Delegate only found a breach of Section 6(4). Only one administrative penalty was imposed, not two.
26. It follows that the issue this evidence would address is not before the Tribunal. It should not be admitted.

B. Breach of Natural Justice

27. While this is listed as a ground of appeal, and there is an assertion of bias against the Delegate and the Branch there is simply no evidence produced to substantiate a breach of natural justice such as is alleged. There is no merit to this aspect of the appeal.

C. Errors in Law

28. Jagir argues that the Director erred in finding non-compliance with Section 6(4) of the Regulation. Section 6(4) requires that a farm labour contractor “must keep at the work site and make available for inspection by the director a daily log”. In this case Jagir says that a vehicle containing the information was temporarily away from the site during a lunch break.
29. An error of law can arise where there is a misinterpretation or misapplication of a statutory provision, a misapplication of a principle of general law, acting without evidence, acting on a view of the facts that could not reasonably be entertained, or where a method of analysis is wrong in principle: *Gemex Developments Corp. v. Assessor of Area No. 12 – Coquitlam* (1998), 62 B.C.L.R. (3d) 354.
30. The error alleged here gives rise to the proper interpretation of the phrase “must keep at the work site”.
31. The proper standard of review, whether by judicial review or appeal, depends on the level of deference that should be afforded the decision maker.
32. What level of deference is appropriate, applying the “pragmatic and functional approach”, can be examined by considering four factors: (1) the presence or absence of a privative clause and/or a statutory right of appeal, (2) the expertise of the tribunal on the issue in question, (3) the purpose of the legislation and the provisions in particular, and (4) the nature of the question: *Ryan v. Law Society of New Brunswick*, [2003] 1 S.C.R. 247, 2003 SCC 20, paragraph 21.
33. With respect to an error of law regarding statutory interpretation the standard, in my view, is correctness. Under the *Act* there is a right of appeal, which is narrowly confined to, *inter alia*, errors of law. Statutory interpretation and the application of principles of general law are questions that traditionally have been

considered to lie within the expertise of the courts: *Burlington Resources Canada Ltd. v. Assessor of Area No. 27 – Peace River* (2005), Stated Case 471, *J.C. Creations Ltd.*, [2003] BC EST #RD317/03. Since the question here is one of statutory interpretation I conclude that the appropriate standard is correctness.

34. As noted by Jagir, the Delegate of the Director interpreted the phrase “must keep at the work site and make available for inspection a daily log” as meaning “The daily log must be on site at all times”. This would, according to Jagir, mean at “all times whether day or night, lunch time or leaving the work time”.
35. It is useful to review the facts which are not disputed here. At noon the Team attended at the work site. There were thirteen employees of the farm labour contractor at the work site, a farm, at the time the Team arrived. The Team interviewed all the employees. None had the daily log. The daily log according to Jagir was in a vehicle on an adjacent farm. It is admitted, then, that the daily log was not at the time of inspection “at the work site”.
36. With respect to the interpretation of Section 6(4) I make the following observations:
- (1) the term “must” is to be construed as imperative: section 29, *Interpretation Act*, R.S.B.C. 1996, c.238;
 - (2) the term “keep” in this context means to maintain in possession and control: *R. v. Woolland* [1935] 3 W.W.R. 220, *R. v. Stannard*, 33 L.J.M.C. 61;
 - (3) the phrase “at the work site” by use of the definite article (“the”) refers to a particular work site, namely, the work site at which the work is being done; and
 - (4) since the farm labour contractor must “make available for inspection” the daily log, the requirements of this provision are to facilitate determining compliance with the *Employment Standards Act* and Regulation.
37. In my opinion the requirement to “keep at the work site and make available for inspection by the director a daily log” is not met if the daily log is episodically removed from the work site during the working day. In a case such as this the daily log was not maintained in possession and control at the work site during the required period.
38. Moreover, the episodic removal of the daily log would frustrate and delay the express purpose of the section, to allow for inspection of the daily log records of the employer by the director at the work site.
39. Jagir argues that finding a breach in its situation leads to the absurdity that records would have to be shown during the night after the work had been done and the farm labour contractor and its employees had left the site. The circumstances of this case, however, concern only a situation where there are employees at the work site in the middle of the working day. The daily log supplied with the appeal shows that the employees worked at the site from 7:30am until 5 pm. The inspection of records would have taken place at noon while the employees were on the work site.
40. For a breach of section 6(4) of the Regulation to be made out it matters not whether representatives of the farm labour contractor or only its employees are on the work site. The temporary absence of a representative of the contractor does not provide an excuse: *Seehra & Sons Contractors Ltd.*, [2000] BC EST #D010/00. Whether it would be a breach of section 6(4) to not have daily logs at the job location

outside of hours when the farm labour contractor or its employees are at the work site is a question that I would leave to be decided when it arises. It does not arise here.

41. It follows, in my opinion, that the Delegate did not err in law in his conclusion that there was a breach of Section 6(4) of the Regulation.
42. Since this was a second contravention an administrative penalty of \$2500 was imposed. No issue was taken with the amount of the penalty nor that there is a second contravention involved.

ORDER

43. The appeal is dismissed and the determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal