

An application for Reconsideration

- by -

Dhillon Labour Contractors Ltd.

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2008A/9

DATE OF DECISION: April 28, 2008

DECISION

OVERVIEW

1. This is an application brought by Dhillon Labour Contractors Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "Act") seeking reconsideration of a decision of a Member of the Tribunal dated January 15, 2008 under #D004/08 (the "Original Decision").
2. The matter came on before the member by way of an appeal filed by the Employer pursuant to section 112 of the *Act* in which the Employer challenged a determination of a delegate of the Director of Employment Standards (the "Delegate") dated September 27, 2007 (the "Determination"). In the Determination the Delegate decided that the Employer had contravened section 6(1)(f) of the *Employment Standards Regulation* (the "Regulation"). The Delegate also determined that since the Employer had contravened the same requirement within the time period prescribed in section 29(1)(c) of the *Regulation*, an administrative penalty of \$10,000.00 must be imposed.
3. In the Original Decision, the Member ordered that the Determination be confirmed.
4. I have before me the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, and the submissions of the Employer and the Delegate on this application for reconsideration.
5. There is no issue as to the timeliness of the application for reconsideration.

FACTS

6. The Employer is a licensed farm labour contractor under the *Act*. As such, it is required to comply with section 6(1)(f) of the *Regulation* which reads:
 - 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...
7. On August 31, 2007 an Employment Standards Branch Agriculture Compliance Team (the "Team") conducted a worksite visit at Origino Greenhouse in Surrey, BC, a location at which the Employer was providing contract farm labour. During the course of the visit Industrial Relations Officer Ravi Sandhu interviewed an individual named Hardeep Choongh who identified himself as an employee of the Employer. Mr. Choongh also told Mr. Sandhu that he had employed a vehicle with BC licence plate number 307 AVR to transport the Employer's employees to the site for work that day. The vehicle in question was not registered with the Branch under section 6(1)(f).
8. On September 5, 2007 the Delegate wrote to the Employer advising that it appeared to have been in contravention of section 6(1)(f) as the investigation during the site visit conducted on August 31, 2007 had revealed that the Employer was using a vehicle with licence plate number 307 AVR to transport

workers to Origino and the vehicle was not registered with the Branch. The Delegate invited the Employer to respond.

9. By handwritten letter dated September 17, 2007, Mr. Dalbir Dhillon ("Dhillon"), a director of the Employer, denied that the vehicle with plate number 307 AVR had been used to transport employees. Instead, Mr. Dhillon advised that it was his personal vehicle, and that he had left it at the Origino site some days earlier because it had broken down.
10. On September 24, 2007, the Delegate had a telephone discussion with Mr. Keith Hammonds, the manager of the Origino Greenhouse. Mr. Hammonds told the Delegate that it was unlikely Mr. Dhillon had left a vehicle at the site for a period of days because, as manager, he would normally have been advised of such an occurrence, and in this instance he had not. Mr. Hammonds also stated that when vehicles broke down, which happened rarely, they were usually towed away quickly, and did not remain on site for days.
11. With this evidence before him, the Delegate recognized that it was his duty to make a finding of fact which depended at least to a degree on his assessment of the various witnesses' credibility. The Delegate decided to prefer the evidence of the Team, and in particular the account of Mr. Sandhu relating to his conversation with Mr. Choongh to the effect that the Employer's employees had been transported to the Origino site that day in the vehicle with plate number 307 AVR. In determining the probabilities the Delegate also relied on Mr. Hammonds' statements casting doubt on the plausibility of Mr. Dhillon's explanation, especially the parts of it which suggested that a broken down vehicle would remain at the Origino site for a period of days without Mr. Hammonds' knowledge.
12. In its appeal to the Tribunal, the Employer asserted that the Delegate had failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available at the time the Determination was being made.
13. With respect to new evidence, the Employer provided the following to the Tribunal:
 - Eight letters signed by its employees working at the Origino site on August 31, 2007, all of which stated that they had never been transported to or from work in the vehicle with licence plate number 307 AVR.
 - A letter from Mr. Hammonds advising that he was on vacation during the period from August 26 to September 2, 2007, and so he could not confirm or deny whether a vehicle had broken down at the site and been towed while he was away.
 - A letter from one Manmeet Kaur Sanghera stating that she was the supervisor for Origino Greenhouse on August 29, 2007 when Mr. Dhillon advised her that his vehicle with licence plate number 307 AVR had broken down and that he was leaving it at the site until he could make arrangements to have it towed. Ms. Sanghera's letter further stated that she told Mr. Dhillon "it is ok you can leave van here."
 - A letter from one Sukhbir Dhillon confirming that on August 29, 2007 Mr. Dhillon telephoned him, told him that his vehicle had broken down and that he required a ride home. The letter further stated that Sukhbir Dhillon then picked up Mr. Dhillon at the address of the Origino site and drove him home.

- A letter from Mr. Choongh denying that he told the "guy" from Employment Standards that he drove the vehicle with plate number 307 AVR. Mr. Choongh's letter further stated that he had never driven that vehicle, and that Mr. Dhillon had transported the Employer's employees to the site that day in a "big white van."
 - An invoice from Clayburn Towing dated September 1, 2007 documenting a tow of a vehicle with plate number 307 AVR from the address of the Origino Greenhouse to an auto repair shop.
 - A garage repair order for a vehicle with plate number 307 AVR dated September 2, 2007.
14. In its written submissions filed with its appeal, the Employer asserted that Mr. Sandhu had misunderstood Mr. Choongh. It also stated that the vehicle with plate number 307 AVR only had seven seats, but eight employees were transported to the Origino site on the day in question. Finally, the Employer argued that the members of the Team were "guessing" that the subject vehicle had been used to transport the Employer's employees to the site, but no one saw any employee of the Employer sitting in that vehicle at any time.
15. In reply to the Employer's assertion that there had been a failure to observe the principles of natural justice, the Delegate's submission to the Tribunal stated that the Employer had been given an opportunity to respond to the specific question raised as a result of the site visit. The Delegate also stated that all of the Employer's arguments had been considered.
16. As for the new evidence, the Delegate submitted that it was available prior to the making of the Determination, but even if it had been presented during the investigation the Delegate's decision would have been no different. The reason the Delegate gave for this was that Mr. Choongh clearly communicated to the Team that he had transported the Employer's employees to the site in a green van, and the only green van at the site was the vehicle with plate number 307 AVR. The Delegate further pointed out that not only was Mr. Choongh now denying he had identified the vehicle in this way, but he was now also taking the position that he had not transported any of the Employer's employees to the worksite at all that day.
17. In a further submission delivered to the Tribunal, the Employer attached an ICBC Owner's Certificate of Insurance and Vehicle Licence for the vehicle with plate number 307 AVR. The Employer pointed out that the Delegate's submission had referred to the vehicle being "green" in colour. However, the Certificate stated that the vehicle was of the colour brown. This created confusion for the Employer as to what the members of the Team may have observed at the Origino site on the day in question, and by inference challenged the reliability of the evidence emanating from the Team, on which the decision in the Determination had been based.
18. In the Original Decision the Tribunal Member concluded that the record before her, and the submissions delivered by the parties, disclosed no basis for a finding that the Employer had been denied natural justice. In support of this conclusion, the Member referred to the following:
- The material submitted by the Employer for the purposes of the appeal did not disclose how the Employer had been denied natural justice. Rather, it focused on what the

Employer asserted was an incorrect conclusion drawn from the available evidence on the part of the Delegate.

- The Employer was given ample opportunity to make submissions in response to the issues raised by the Delegate during the course of the investigation. The Delegate considered those submissions before making the Determination.
- The Delegate's obligation to make findings of fact was complicated in this case because there was conflicting evidence as to why the vehicle with plate number 307 AVR was present at the Origino site at the relevant time. After weighing that evidence, the Delegate decided to prefer the evidence collected by the Team to that offered by Mr. Dhillon. The Delegate gave an explanation for this decision in the Reasons for the Determination.

19. On the issue of new evidence, the Member referred to the tests normally applied by the Tribunal in resolving appeals brought pursuant to section 112(1)(c) of the *Act*, as set out in the oft-cited decision of the Tribunal in *Bruce Davies* BC EST #D171/03. Regarding the new material the Employer submitted with its Appeal Form the Member noted that no explanation was provided by the Employer outlining the reasons why this material had not been submitted to the Delegate during the course of the investigation. On that ground alone, the Member determined that the new evidence the Employer sought to tender was not "new" for the purposes of the *Act* at least because the Employer had not shown that the evidence was not available at the time the Determination was being made.
20. As for the evidence concerning the colour of the van, which had not arisen during the Delegate's investigation, but had only appeared during the course of the appeal, the Member concluded that it lacked the high potential probative value required in order for it to warrant a finding that the Determination should be varied or cancelled, or the matter referred back to the Director. More specifically, the Member decided that even if the Delegate had found that the vehicle with plate number 307 AVR was brown in colour, that fact could not, either on its own, or together with other evidence, have led the Delegate to a different conclusion on the material issue, namely, whether employees of the Employer had been transported to the Origino site in a vehicle that was not properly registered under section 6(1)(f) of the *Regulation*. The main reason given by the Member was that any possible confusion about the colour of the vehicle on August 31, 2007 was overwhelmed by the clear evidence, accepted by the Delegate, that Mr. Choongh had told the Team he was the Employer's driver, that he had transported the Employer's employees to the Origino site in the vehicle which had plate number 307 AVR, and that there was no evidence suggesting there was any other vehicle on the site that day.
21. In the result, the Member ordered that the Determination be confirmed.
22. The Employer's submissions on this application for reconsideration mirror the submissions made by the Employer to the Tribunal on the original appeal.

ISSUES

23. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

24. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

116(1) On application under subsection (2) or on its own motion, the tribunal may

- (a) reconsider any order or decision of the tribunal, and
- (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

25. Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BCEST #D313/98, and *Bruce Davies, supra*, have consistently held that the reconsideration power is discretionary, and must be exercised with restraint. This attitude is in part derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision emanating from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. In giving voice to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.
26. Having said that, the Tribunal may take a more indulgent attitude towards an offer of new evidence where that evidence is not intended to challenge the merits of a decision, but is instead tendered in support of an argument that some aspect of the procedural fairness of the proceedings in question was compromised. A reason cited for this posture is that violations of a party's right to procedural fairness are often difficult to discern from a review of the record alone (see *Grant Howard* BC EST #D011/07).
27. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness: *Zone Construction Inc.* BCEST #RD053/06.

28. In determining whether the Employer has met its obligation to raise issues flowing from the Original Decision which demand a review it is important to note that the Employer's submissions on this application for reconsideration merely repeat in substance the arguments it made during the appeal process. Those arguments related entirely to the facts surrounding the incident in question. They in no substantive way challenged the procedural content of the process that was followed. In the Employer's submissions on this application, then, I see no critique of the Original Decision, and therefore no analysis suggesting why the Original Decision may have been rendered in error. As with the appeal process generally, it is the obligation of a party seeking reconsideration to ensure the sufficiency of its material and to present cogent arguments explaining why the decision that is challenged should be varied or set aside.
29. It is obvious that the Employer believes the evidence it assembled after the Determination was issued speaks for itself. That must be the reason why the Employer has offered it again, I assume in the hope that another Member of the Tribunal may take a different view of it than the one expressed in the Original Decision. In my view, that is not the intent of section 116 of the *Act*. The absence of any specific challenge to the mode of analysis employed in the Original Decision, and the reasoning supporting the conclusions appearing in it, renders it impossible to accept that a reconsideration is warranted at all. This is especially so given that it is my view that the Original Decision reveals nothing on its face which demands intervention by way of reconsideration. To the contrary, the Original Decision reviews carefully all the issues raised by the Employer in the appeal, identifies the relevant tests relating to those issues, and applies them in a manner that appears to me to lead to a result that is entirely correct in the circumstances.
30. It follows that I have decided that the Employer has failed to meet the burden imposed on it at the first stage of the inquiry. There is no need, therefore, to consider whether the Original Decision was correct on the merits.

ORDER

31. Pursuant to section 116(1)(b) of the *Act*, I order that the decision of the Tribunal dated January 15, 2008 under #D004/08 be confirmed.

Robert Groves
Member
Employment Standards Tribunal