

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Baloo Farm Contractors Ltd.
(" Baloo or farm labour contractor ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No.: 1999/361

DATE OF DECISION: January 17, 2000

DECISION

OVERVIEW

This is an appeal by Baloo Farm Contractors Ltd. (Baloo, or “employer”) of a Determination dated May 20, 1999. The principal issue to be determined is whether the Delegate erred in imposing a penalty for the failure of Baloo to register its vehicle with the Employment Standards Branch. The amount of the penalty imposed was \$150.00. In this decision I have confirmed that a penalty should be issued against the employer in the amount determined by the Delegate.

ISSUE

Did the employer breach 6(1)(f) of the *Regulation* in that it failed to supply the Employment Standards Branch with a licence number for a vehicle used to transport employees?

Did the Delegate err in imposing the penalty?

FACTS

Baloo is a farm labour contractor, in business in the lower mainland area. On May 19, 1999, a Delegate attended at the Singh Bros. Farm on 38820 Lougheed Highway (the “farm”). At the farm was a vehicle bearing BC licence plate 6635-DD which was not registered with the Director of Employment Standards. The Delegate determined that Baloo had transported 14 employees to the farm in the unregistered vehicle.

The reasons for appeal advanced by Baloo are as follows:

The vehicle was already registered with the employment standard. Though the insurance was cancelled as there was no work. Later on the insurance was reinstated and therefore the vehicle has different plate number of which appellant was not aware. (Sic)

Baloo has provided no evidence to contradict the findings made by the Employment Standards officer. It has, however, offered an excuse for failing to register. This excuse, however, has no substance. At the time of the issuing of the insurance, a representative of the employer would have had the new licence plates. There is no evidence that Baloo provided the new licence numbers to the Employment Standards Branch.

As part of its written submission, the Delegate provided a copy of a status report and information package “To all Farm Labour Contractors Re: 1999 Harvest Season”. The status report and information package indicates that the Branch would continue to monitor Farm Labour Contractors to ensure compliance with the *Act and Regulations*. The material filed indicates that a representative of the employer obtained a copy of this package.

In its application for a 1999 renewal of the Farm Labour Contractor's Licence, Baloo failed or neglected, to fill out an answer to question 17 which requires the applicant to identify the year, make, model, licence number, and vehicle identification number for each vehicle used for transporting employees.

In all the circumstances, I cannot accept the excuse advanced by the employer for failing to comply with the *Regulation*. I find that there was a wilful breach of the *Regulation* by the employer.

Baloo has a past record of violating section 6(1)(f) of the *Regulation* on one occasion. The Director imposed a penalty of \$150.00, and also provided notice that should these offence occur again it would result in a penalty of \$250 per employee, and contraventions beyond this to a maximum of \$500.00 per employee. The Delegate also noted that the Director can cancel or suspend a farm labour contractor's licence, subject to the provisions of this section.

In the Director's submission, was attached a copy of a Determination dated July 31, 1998 where the Delegate imposed a zero penalty determination, for a breach of s. 6 (1)(f) of the *Regulation*.

ANALYSIS

The *Act* provides, in section 13, that a person must be licenced to act as a farm labour contractor. A farm labour contractor is defined in the *Act*, as an employer whose employees work under the direction of another person in the connection with the planting, cultivation or harvesting of an agricultural product. In section 127 of the *Act* the Lieutenant Governor in Council has been given the power to make regulations respecting the licencing and duties of farm labour contractors.

Issue #1: Violation of the Licencing Requirement?

In this case the Director's delegate found that the employer violated section 6(1)(f) of the *Employment Standards Regulation*. This section reads 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

I have no doubt that the employer was fully aware of the requirement to provide an updated list as it had been found in violation of this particular *Regulation* at an earlier time, and the legislation was therefore known to the employer. Further the status report and information package, which the employer obtained, contained information related to these requirements. The

application form specifically requests information relating to vehicles to be used. I do not accept the excuse offered.

The requirement to file an up-to-date list of registration and licence numbers of each vehicle used by the farm labour contractor for transporting employees is an important tool used by the Director to monitor compliance with the *Act and Regulations*. The written submission of the Delegate indicates that the Agricultural Compliance team relies on the vehicle information and particularly the licence plate to help identify unlicensed contractors, and to ensure that contractors are not inspected too frequently. The fact that there is a specific team devoted to monitoring compliance indicates that the Director is aware of ongoing problems with regard to employment standards in the agriculture sector.

Issue #2: Amount of the Penalty

In this case the penalty was imposed pursuant to section 98 of the *Act* and section 29 of the *Regulations*. Section 98 of the *Act* provides a discretion to the Director to impose a penalty in accordance with the prescribed schedule of penalties. Section 6 of the *Regulation* is a specified provision, set out in Appendix 2, which attracts the escalating penalty regime set out in 29(2) of the *Regulation*. The employer has a past history of violating this particular section of the *Regulation* on one past occasion. In this case the proper penalty was \$150.00 per employee affected as set out in 29(2)(b). The Director imposed a penalty of \$150.00 and provided that further contraventions will result in a penalty of \$250.00 per employee as set out in section 29 to a maximum of \$500.00 per employee.

My preliminary view, was that while the Delegate had the discretion to impose a penalty, the Delegate erred in the amount of the penalty imposed, and that the penalty should have been \$2,100 given that there were 14 employees present at the time of the violation. This was on the basis of the wording of section 29(2) which indicates that the penalty is “\$150 multiplied by the number of employees affected by the contravention if the person contravening the provision has contravened the provision of that Part on one previous occasion.” I sought further submissions from the parties, and received a further submission from the Delegate. The farm labour contractor did not file a submission.

The Director argues that the discretion to impose a penalty, carries with it the power to reduce an otherwise “disappropriate penalty”, or to tailor the penalty to fit the facts of the case. In its written submission counsel for the Director cited the case of Super Gas Bcest #D374/97. This case, however, did not deal with the issue of the amount of the penalty, but rather dealt with the issue of whether there was a discretion to impose a penalty. It is quite clear that the Director does have the discretion to impose or not impose a penalty. The Director must give reasons which support the exercise of the decision making power. Having made a decision to impose a penalty, the Director appears to have the power to escalate the penalty based on previous violations of the *Act*, and based on the number of employees affected by the breach. Here the Director appears to have chosen to escalate the penalty based upon the past violation only. It, however, could, in an appropriate case escalate the penalty based on past violations of the *Act* and the number of employees affected by the breach. The Director appears to be taking the position that this

particular breach of the *Act* in the circumstances of this case does not monetarily affect a number of employees, and therefore it is appropriate to escalate the penalty on the basis of the past record only. As a result of reviewing the further submission of the Delegate, I am satisfied that the appropriate penalty in this case was a penalty of \$150.00 as imposed by the Delegate.

ORDER

I confirm the Determination dated May 20, 1999, pursuant to section 115 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal