

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 -

Randhawa Farm Contractors Ltd.
("Randhawa" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE No.:	97/816
DATE OF HEARING:	December 1, 1997
DATE OF DECISION:	February 11, 1998

DECISION

APPEARANCES

Mr. Pab Chetty Mr. Kunwarpia Randhawa	on behalf of Randhawa
Ms. Adele Adamic Mr. Jim Walton Ms. Gagan Dhaliwahl	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations of the Director’s delegate issued on November 7, 1997.

In one Determination, the Director’s delegate found that Randhawa contravened Section 17(1) of the *Act* for the second time in failing to pay employees semi-monthly and imposed a penalty \$150.00 multiplied by 84 affected employees, for a total of \$12,600.00. In the other Determination, the Director’s delegate cancelled Randhawa’s farm contractor licence pursuant to Section 7(c) of the *Employment Standards Regulation* (the “Regulation”). Randhawa disputes the penalty and the cancellation of the licence.

ISSUE TO BE DECIDED

The issues to be decided in this appeal is whether it was a reasonable exercise of the Director’s authority under Sections 79 and 98 of the *Act* to issue the November 7, 1997 Determinations.

FACTS

Mr. Randhawa testified on behalf of the Employer which had been operating as a farm labour contractor for some 9 years. It was licensed for 100 employees. A company owned or controlled by Mr. Randhawa’s wife is licensed for 100 employees. Mr. Randhawa testified that the Employer had, from time to time, approximately 150 employees. The annual payroll for the Employer is approximately \$1.9 million. Mr. Randhawa also has a 15 acre dairy farm.

On May 9, 1997, the Employment Standards Branch (the “Branch”) mailed out an information package to those who held a farm labour contractor licence in 1996. The information contained express reference to the requirement to pay semi-monthly and other statutory requirements. Mr. Walton, an Industrial Relations Officer and a delegate of the Director, testified that the package

was mailed out to the 1996 address of the Employer. Mr. Randhawa denied receiving the information. He agreed that the Employer's address had not changed.

Mr. Randhawa testified that the Employer pays monthly, not semi-monthly. Mr. Randhawa was aware that he had to pay semi-monthly. He passed the farm labour contractor examination in March of 1997 which requires knowledge of the *Act* and *Regulations*. He was required to take this exam every year. Moreover, Mr. Randhawa stated on the application form for renewal of the Employer's licence that the Employer intended to pay its employees every two weeks. Mr. Randhawa explained that the employees did not want to be paid semi-monthly. No employee testified to this. However, employees of the Branch spoke with a number of employees who did not complain about being paid monthly. Mr. Randhawa agreed that he attended the office of the Branch that he was told that he had to pay semi-monthly. He explained to employees of the Branch that his employees did not want to be paid semi-monthly. His evidence was that he was told to make semi-monthly cheques and leave it up to the employees to decide whether to pick up the cheques.

Mr. Randhawa agreed that the Employer's licence was cancelled on July 17, 1997. At that time he attended the Branch office to deliver records pursuant to a Demand for Records. He stated that the Employer would have complied with the *Act* if he had known that it could lose its licence.

Mr. Walton testified that Mr. Bull, another industrial relations officer and a delegate of the Director, issued a Demand for Employer Records to the Employer on May 15, 1997. The Demand covered records between January 1 and May 15, 1997 for all employees of the Employer. The Demand was part of a project to ensure the compliance of farm labour contractors with the *Act* and *Regulation*. The Demand was hand delivered to the Employer.

On July 3, 1997, Mr. Bull issued two Determinations. The first was in respect of the Employer's:

- failure to pay semi-monthly (Section 17(1) of the *Act*); and
- failure to carry the licence, show and display same (Section 6(1), (a), (b), (d) of the *Regulation*).

The second dealt with:

- a contravention of Part 5 of the *Act* (statutory holiday pay); and
- a contravention of Section 58 of the *Act* (vacation pay)

The Determinations resulted in "\$0.00" penalties and expressly made reference to the Director's authority under Section 7 of the *Employment Standards Regulation* to cancel or suspend a farm contractor's licence and authority to impose penalties for contraventions of the *Act* and *Regulation*. Mr. Randhawa testified that he never received these Determinations. The stamp on the document indicating service was not filled out. Due to non-compliance with Sections 27 and 28 of the *Act*, two employees of the Branch hand delivered a further Demand for Employer Records to the Employer at the Branch office on July 3, 1997.

On July 17, 1997, Mr. Walton issued two further Determinations which were delivered to the Employer at the office of the Branch, according to the stamp on the face of the document. The basis for the Determinations was the Employer's failure to carry the licence and show (Section 6(1), (a) and (b), *Regulation*). One Determination cancelled the Employer's licence, the other provided for \$150.00 fine. The Employer did not appeal these Determinations. The July 17, 1997 Determinations made express reference to the earlier July 3, 1997 Determinations. One Determination stated:

“On July 3, 1997, Bill Bull, a delegate of the Director of Employment Standards, issued a penalty Determination (Copy Attached) in the amount of \$0.00 as Randhawa Farm Contractors Ltd. had contravened section 6(1)(a) and 6(1)(b) of the Employment Standards Regulation.”

There was no reference to in the Determinations to the earlier contraventions of Section 17(1) of the *Act*.

Mr. Walton testified that on an initial non-compliance, the Director would issue a “\$0.00” penalty. On a second breach of the same Section, the penalty was at the \$150.00 level and could result in the farm contractor licence being cancelled. However, the licence could be re-instated, usually on the same day, if the employer agreed to comply in the future and paid the outstanding penalty. In this case, the Employer's licence was re-issued.

On September 15, 1997, Mr. Walton issued a Demand for Employer Records between July 1 and September 13, 1997 for all employees of the Employer. He received the documents. On October 31, 1997, he issued two Determinations for:

- contraventions of Section 13(1) of the *Act* (for employing 189 individuals, more than the 100 permitted under the licence); and
- Section 23 of the *Act* (requirement to pay overtime).

Both Determinations expressly stated that the Director had the authority under Section 7 of the *Employment Standards Regulation* to cancel or suspend a farm contractor's licence and impose the penalties for contraventions of the *Act* and *Regulation*. The Director's delegate testified that he issued a further Demand for Employer Record.

On November 7, 1997, Mr. Bull, the Director's delegate, issued the two Determinations which are the subject of this appeal. The Determinations were delivered to the Employer in at meeting at the Branch. The Determinations were, as mentioned above, based on the Employer's failure to pay semi-monthly. Based on the payroll records supplied by the Employer, the Director's delegate found that the number of affected employees was 84, thus the fines was \$150.00 multiplied by 84, for a total of \$12,600.00. From the review of the records, it appeared to the Director's delegate that 20 employees were paid semi-monthly. According to the Director's delegate there were still payroll documents outstanding for the balance of up to 189 individuals who had been found to be working for the Employer on August 15, 1997. Mr. Walton testified that he considered the

cancellation of a farm labour contractor a serious matter. The licence was only cancelled after discussions with the Director and the Regional Manager of the Branch.

Mr. Walton's evidence was that he and Ms. Dhaliwahl discussed the July 3, 1997 Determination with Mr. Randhawa at the meeting on November 7, 1997. Mr. Randhawa did not at the time dispute having received the earlier Determination.

ARGUMENT

Randhawa argues that it has been in business for years without problems with the Branch. Mr. Randhawa derives his livelihood from the farm labour contractor business and supports his wife and three children with the income from the business. Cancelling the licence will take away Mr. Randhawa's livelihood. He argues that the *Act* is a bureaucrat's dream and that Randhawa has been hounded for information. When Mr. Randhawa asked for assistance with respect to Randhawa's employees, who did want to be paid semi-monthly, the Branch was of no assistance. The employer's counsel notes that Mr. Randhawa was fully cooperative with the Branch and supplied the information requested. He paid his employees and never had any complaints.

He further argues that there is no evidence that Randhawa received the information from the Branch which was mailed out based on a list of those who held a farm labour contractor license in 1996. He also argues that there is no evidence that Randhawa received the Determinations dated July 3, 1997 which, among others, included a breach of Section 17(1) of the *Act* (requirement to pay semi-monthly) and warned of the director's power to cancel the farm contractor licence. In that regard he, notes that the stamp indicating service was not completed. Randhawa's licence was taken away once, when it paid the fine, leaving it with the impression that the licence could be returned upon payment of the fine. Counsel for Randhawa ask that the licence be restored and fine returned.

Counsel for the Director argues that the Employer has been in the business for many years and is a large employer with an annual payroll of \$1.9 million. Counsel notes that there was a history of contact between the Employer and the Branch and emphasized the Employer's knowledge of the *Act* and the *Regulation*. In short, the Employer knew of the requirement to pay semi-monthly. Section 95 of the *Act* (penalties) came into the legislation in 1995 for the purpose of creating a level playing field among employers and to ensure basic standards of employment (Section 2 of the *Act*). Section 28 of the *Act* expressly provides for escalating penalties. Randhawa is asking the tribunal to believe that the employees asked the employer to waive minimum requirements. Even if that was the case, such an agreement would be void (Section 4 of the *Act*).

Counsel for the Director further argues that there is no evidence that Randhawa did not receive the documents. The Branch had been consistent with respect to each Determination. The employer attended an interview on July 3, 1997, and, as a result, received a new licence dated July 17, 1997. On balance, Randhawa's explanation is not credible. The employer showed a consistent pattern, despite the meetings with officers of the Branch and the earlier cancellation of the licence. The Directors delegate requested further information from Randhawa before cancelling the licence.

In the result, the Director's delegate exercised his discretion in a reasonable manner and asks that the Determinations be confirmed.

ANALYSIS

Section 17 of the *Act* provides (in part):

17. (1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

In this case, the Employer admitted that the employees were not paid semi-monthly, as required by the legislation. Mr. Randhawa was clearly aware that he had to pay semi-monthly. First, he passed the farm labour contractor examination in March of 1997 which requires knowledge of the *Act* and *Regulations*. He was required to take this exam every year. Second, Mr. Randhawa stated on the application form for renewal of the licence that the Employer intended to pay its employees every two weeks. Third, Mr. Randhawa agreed that he attended the office of the Branch that he was told that he had to pay semi-monthly. Fourth, the Employer has been in the farm labour contracting business for about nine years. I agree with counsel for the Director that the Employer's explanation, that its employees did not wish to be paid semi-monthly, and that the Employer was simply accommodating them, even if true, would contravene Section 4 of the *Act* which provides that any agreement to provide less than the minimum standards set out in the *Act* is void.

With respect to the penalty, Section 98 of the *Act* provides (in part):

98. (1). If the director is satisfied that a person has contravened a requirement of this Act or the regulations ... , the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

Under Section 7 of the *Regulation*, the Director may cancel or suspend a farm labour contractor's licence. Section 7 provides as follows (in part):

7. The director may cancel or suspend a farm labour contractor's licence in any of the following circumstances:
 - (c) the farm labour contractor ... contravenes the Act or this regulation.

As indicated by the word "may", this is a discretionary power.

Section 98 provides the Director with the discretion to impose a fine in accordance with the *Regulation*. Once the Director has exercised the authority to impose a fine, there is no discretion

with respect to the amount. Those are provided by *Regulation*. Section 29(2) of the *Regulation* provides for penalties of “\$150.00 multiplied by the number of employees affected by the contravention” where the Employer has contravened the particular provision on one previous occasion. The evidence of the Director’s delegate was that he could have waited for the remaining payroll records and (perhaps) had the basis for a greater penalty. In this case, the employer led no evidence with the number of infractions or the number of employees affected.

The burden is on the appellant, here the Employer, to prove that the Director’s delegate exercised his authority in a manner contrary to the *Act* and the *Regulation*. The bald assertion that Randhawa was being “hounded by the minions” and “bureaucrats” of the Branch was not supported by any evidence. Quite the contrary, the Employer had a lengthy history of violations of the *Act* and *Regulation*. In my view, Randhawa was warned expressly on several occasions that failure to comply with the *Act* and *Regulation* could result in the cancellation of the licence. In fact, the licence was cancelled once and subsequently reissued. Moreover, there was no credible evidence before me upon which I could conclude that the employees of the Branch and the Director’s delegate carried out their business in a less than professional manner.

That is not the end of the matter. In my view, the success of the Employer’s appeal turns on the the Employer’s alleged failure to receive the July 3, 1997 Determination, *i.e.*, the first Determination with respect to the requirement to pay semi-monthly.

Mr. Walton testified to the practice of either mailing Determinations by registered mail or hand delivering them at the interview with an employer. Mr. Walton was not present at the interview on July 3, 1997 when the Determination was given to the Employer, nor, indeed were any other of the witnesses for the Director. Mr. Randhawa’s evidence was that he was quite certain that he did not receive the Determination. Counsel for the Director argues that there is no credible evidence that the Employer did not receive the July 3, 1997 Determination. In all of the circumstances, I am inclined to agree. Overall, I found Mr. Randhawa to be evasive and vague in his testimony, including with respect to his knowledge of the requirements of the *Act* and *Regulation*. With respect to the specific issue of whether the Employer actually received the July 3, 1997 Determination, Mr. Randhawa’s testimony was less that credible. First, it is clear that there was a meeting on July 3, 1997. A Demand for Employer Records was hand delivered to Mr. Randhawa on that date at the Branch office. Mr. Randhawa was uncertain what actually transpired at the meeting, apart from his insistence that he did not receive the Determination. Second, Mr. Randhawa could not recall receiving most of the Demand for Employer Records and Determinations, which were delivered to him, including those under appeal.

Section 122(1) of the *Act* states:

A determination or demand that is required to be served on a person under this Act is deemed to have been served if

- (a) served on the person, or
- (b) sent by registered mail to the person's last known address.

The burden of providing that the Employer actually was personally served the July 3, 1997 Determination rests with the Director. This requirement could have been met by having the person who delivered the document to the Employer testify to that effect. In this case, the monetary penalties are substantial. The cancellation of the licence will put the Employer out of business. Mr. Walton testified that the monetary penalties and the cancellation of the licence on November 7 was based on the July 3 Determination, *i.e.*, the first violation of that particular provision. Mr. Walton testified that penalty and cancellation of the licence would occur after the second violation of the same provision. If the Employer did not receive the earlier Determination, the Employer's ability to appeal the Determinations with respect to the penalty and the cancellation is seriously impaired. The time has passed for the Employer to now question the validity of the initial Determination.

In this case, I find that the Determinations should be set aside.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated November 7, 1997 be cancelled and the amount of the penalty be returned to the Employer together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal