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 -

Jas-Ran Construction Ltd. operating as "Valley Contractors"
(" Jas-Ran ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/649

DATE OF DECISION: March 17, 2000

DECISION

OVERVIEW

This is an appeal brought by Jas-Ran Construction Ltd. operating as "Valley Contractors" ("Jas-Ran") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 6th, 1999 under file number 76983 (the "Determination").

On February 20th, 1998, a Director's delegate issued a $0 monetary penalty against Jas-Ran for operating as a farm labour contractor without being licensed contrary to section 13(1) of the *Act.* This $0 penalty determination, issued pursuant to section 29(2)(a) of the *Employment Standards Regulation,* was never appealed by Jas-Ran and the governing appeal period has now long since expired.

By way of the Determination currently under appeal, a delegate of the Director imposed a monetary penalty in accordance with the provisions of section 98 of the *Act* and section 29(2)(b) of the *Employment Standards Regulation.* Jas-Ran was penalized for a second violation of section 13(1) of the *Act*--operating as a farm labour contractor without the appropriate licence. Inasmuch as this was Jas-Ran's second contravention of section 13(1), the delegate levied a penalty of $150 per affected employee (21 in all) for a total monetary penalty of $3,150.

ISSUES TO BE DECIDED

Legal counsel for Jas-Ran says that the Determination should be cancelled because:

- the crop being harvested on the day in question (September 26th, 1999) belonged to a numbered company (560144 B.C. Ltd.) that is associated with Jas-Ran;
- "The penalty is excessive because Jas-Ran Construction Ltd. was a licensed Farm Contractor in 1998 contrary to the assertion in the Determination of February 20, 1998 [N.B., this was the determination issued for the previous contravention] making this a first offense"; and
- "The penalty is excessive and unfair because the Determination of February 20, 1998 was never received by the Applicant as indicated by the Registered Letter Card".

In addition, legal counsel for Jas-Ran asserts that since the previous $0 penalty determination was "defective", the present contravention ought to be treated as a "first offence".

I shall deal with each of these issues in turn.

ANALYSIS

Ownership of the crop

In its appeal documents Jas-Ran asserts that: "[Jas-Ran] and [the numbered company] were not operating as Farm Labour Contractors because they were harvesting their own crop. Doug Regehr Farms merely owned the land."

This ground lacks merit. As set out in the Determination itself, on September 26th, 1999 Jas-Ran employees were found to be harvesting a ginseng crop for the Doug Regehr Farm pursuant to a contract between those two parties. This latter information was confirmed by not only the principal of Doug Regehr Farm but also by the principal of Jas-Ran, Mr. Jasbir Aujla.

Jas-Ran licensed in 1998

The material before me discloses that Jas-Ran was licensed in 1998 as a farm labour contractor. However, and this is the key point, that licence was not issued until April 9th, 1998 whereas the 1998 contravention (*i.e.,* the basis for the previous February 20th, 1998 $0 penalty determination) occurred in February 1998 at a time when Jas-Ran was not licensed.

Notice and validity of prior determination

The February 20th, 1998 determination, never having been appealed, now stands as a final order. If the appellant wishes to challenge the February 20th determination, it ought to do so directly rather than obliquely by way of the present appeal proceedings. For example, the appellant could still apply--despite the obvious dubious prospects for success--for an extension of the appeal period with respect to the February 20th determination. I presume the reason why the February 20th determination was not (and is not now being) appealed is because the appellant has absolutely no defence on the merits. I reject the suggestion that the February 20th determination is defective, however, that issue is not before me since, as I have previously stated, these proceedings cannot be used as a springboard to reopen a prior determination--the February 20th determination is now *res judicata.*

As for the allegation regarding lack of notice, the evidence before me clearly discloses that the appellant *was given notice* of the previous February 20th determination. This latter determination was mailed, by certified mail, to Jas-Ran on February 20th, 1998 but that mailing was returned on March 12th, 1998 as "unclaimed". However, by reason of section 122 of the *Act,* Jas-Ran was deemed to have been validly served with the determination. Quite apart from the foregoing, on March 13th, 1998 Jas-Ran's principal, Mr. Aujla, was personally advised, both orally and in writing, by a representative of the Employment Standards Branch about the February 20th determination--indeed, a further copy of the February 20th determination was given to Mr. Aujla on that day (this latter point is confirmed by an acknowledgement of receipt signed by Mr. Aujla).

To summarize, none of the grounds of appeal has any merit whatsoever. This appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the October 6th, 1999 Determination be confirmed as issued in the amount of **$3,150.**

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal