

An appeal

- by -

Subedar Contractors Ltd.  
("Subedar")

- 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

**TRIBUNAL MEMBER:** Matthew Westphal

**FILE No.:** 2005A/35

**DATE OF DECISION:** May 10, 2005

## DECISION

### OVERVIEW

This is an appeal by Subedar Contractors Ltd. (“Subedar”) under s. 112 of the *Employment Standards Act* (the “*Act*”) of Determination ER # 108-500, dated January 28, 2005 (the “*Determination*”), issued by a delegate (the “*Delegate*”) of the Director of Employment Standards. The *Delegate* ordered Subedar to cease contravening s. 6 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “*Regulation*”), and imposed an administrative penalty of \$500 for that contravention.

The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the *Determination*, the submissions of the parties, and the record provided to me, I am dismissing Subedar’s appeal and confirming the *Determination*.

### ISSUES

Did the *Delegate* err in law or fail to observe the principles of natural justice in making the *Determination*?

### BACKGROUND

Subedar is a licensed farm labour contractor under the *Act*. On September 29, 2004, the *Delegate* issued Subedar a Demand for Records (the “*Demand*”), pursuant to s. 85(1)(f) of the *Act*, for the period from January 1, 2004 to September 30, 2004. The *Demand* required Subedar to disclose, produce, and deliver by October 13, 2004 all payroll records related to:

- wages, hours of work, and conditions of employment as specified under s. 28 of the *Act*;
- all direct deposit information, cancelled cheques and bank statements; and
- “daily logs as required under s. 6(4)(5) [*sic*] of the *Regulation* including the volume or weight of fruit, vegetable, berry or flower crop picked in each day by each worker (section attached)”.

Subedar did not provide any of the demanded records by the deadline set out in the *Demand*. On December 9, 2004 the *Delegate* did receive payroll records, cancelled cheques, and daily logs, but the daily logs did not include the volume or weight of berry crop picked in each day by each worker. According to the *Delegate*, he gave Subedar a further opportunity to provide this information, but Subedar was unable to do so.

As far as I can determine, Subedar had not been recording the volume of weight of berry crop picked by each of its workers in each day. Subedar appears to have believed it was not required to record this information because it paid its workers at an hourly rate, rather than according to the volume or weight of berry crop they picked. The *Delegate* provided the Tribunal a checklist dated January 5, 2004, that was reviewed with Subedar and signed by Subedar’s representative in the course of its application for a farm labour contractor license. This checklist informs applicants that the Director’s Agricultural Compliance Team will verify compliance with the *Act* and *Regulation* by visiting worksites and performing payroll

audits. The checklist identifies payroll demands as a “0 Tolerance” issue, and specifies that “Volume or weight of fruit, vegetable, berry, or flower crop picked in each day by each worker must be maintained regardless of the method of payment.”

## SUBMISSIONS

Subedar argues that it should not have received a penalty for failing to maintain and provide records of the amount of berries picked each day by each worker because it pays its workers at an hourly rate. It also notes that it has a “very clean record with WCB, Payroll and with all my employees since I started the work.”

The Delegate emphasizes the mandatory language of s. 6(4)(e), and the fact that Subedar had been specifically informed that it must record volume or weight of crop picked in each day by each worker “regardless of the method of payment.” The Delegate argues that Subedar is not denying that it failed to keep these records, but is “simply providing a reason why records were not kept”. In his submission, “a disincentive is needed to promote compliance with the Act to prevent a repeat contravention.”

## ANALYSIS

Although Subedar appealed on the basis that the Delegate failed to observe the principles of natural justice in making the Determination, it has not provided any particulars of how the Delegate failed to comply with these principles, such as through bias or a failure to provide Subedar with notice of the allegations against it or with an opportunity to respond. Thus, the appeal on natural justice grounds must be dismissed.

In my view, however, the true basis of Subedar’s appeal is a claim that the Delegate erred in law in penalizing it for failing to maintain and provide records of the amount of berries picked by each of its workers, given that Subedar paid them at an hourly rate rather than according to the amount of berries they picked. Accordingly, I will consider the appeal on this basis.

Section 6 of the *Regulation* provides, in part, as follows:

- 6(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.
- (5) The records required by subsection (4) must
  - (a) be in English, and
  - (b) be retained by the employer for 2 years after the employment terminates, at the employer’s principal place of business in British Columbia.

[emphasis added]

As this provision makes clear, the obligation to make and retain a daily log of the volume or weight of crop picked in each day by each worker, applies to every farm labour contractor. It does not exempt farm

labour contractors that pay their workers not according to the weight of crop they pick, but according to the hours they work. That Subedar may have considered the keeping of such records unnecessary because it paid its workers at an hourly rate, did not relieve it from its obligation to do so.

Since Subedar has not denied that it failed to keep all of the records it was required to keep under s. 6(4) of the *Regulation*, the Delegate correctly found that Subedar contravened this provision. Accordingly, under s. 98 of the *Act* and s. 29(1)(a) of the *Regulation*, the Delegate was required to impose an administrative penalty of \$500 for this contravention. Given the language of the *Act* and *Regulation*, this penalty was mandatory regardless of whether the Director considered it necessary in the circumstances to promote compliance with the statute and prevent a repeat contravention.

For these reasons, I dismiss Subedar's appeal.

## **ORDER**

I order, pursuant to s. 115(1)(a) of the *Act*, that the Determination be confirmed.

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**Matthew Westphal**  
**Member**  
**Employment Standards Tribunal**