

An appeal

- by -

IS Enterprises Ltd.

- 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: David B. Stevenson

FILE No.: 2003A/254

DATE OF DECISION: May 12, 2004

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the IS Enterprises Ltd (“IS Enterprises”) of a Determination that was issued on September 4, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Director found that IS Enterprises had contravened Section 5(4) of the *Employment Standards Regulation* (the “*Regulations*”) by failing to meet a condition of their farm labour contractor licence and imposed an administrative penalty under Section 29 of *Regulations* in the amount of \$500.00.

The appeal says the Director failed to observe principles of natural justice in making the Determination and asks that it be cancelled.

In the appeal form, under paragraph 6, which asks whether the appellant believes an oral hearing is necessary and, if so, why, IS Enterprises states:

We have the licence for 5 persons and currently are not operating and we are still looking for business, once we start operating we will start paying our employees by Direct Deposit. We did not know that we had to set the Direct Deposit System even though we are not operating.

After considering the Determination, the appeal and the material on file, the Tribunal has decided an oral hearing is not necessary in order to adjudicate the appeal.

ISSUE

The issue is whether the Director erred in imposing an administrative penalty on IS Enterprises for failing to meet a condition of its farm labour contractor licence.

THE FACTS

IS Enterprises is a licensed farm labour contractor under the *Act*. Section 13 of the *Act* prohibits any person from acting as a farm labour contractor unless licensed under the *Act*. Provisions relating to the licensing of farm labour contractors are set out in Part 2 of the *Regulations*.

In a communication dated April 25, 2003, the Director gave notice to farm labour contractors generally of a meeting to introduce a new operational policy. The body of that communication stated:

On May 8, 2003, Lee Doney, Deputy Minister of Skills Development and Labour, and Bud Graham, Acting Deputy Minister of Agriculture, Food and Fisheries will be co-chairing a meeting with all farm labour contractors. The purpose of the meeting is to introduce a new operational policy that will affect all farm labour contractors for the upcoming season.

As the new policy changes will be effective for this upcoming harvest season, all farm labour contractors are strongly encouraged to attend the meeting.

The location of the meeting was given, along with a contact number if there were “any further questions or concerns”. The material on file does not contain any other information about that meeting.

The Determination reasons note the Director issued a new operational policy for farm labour contractors on May 15, 2003 that required all farm labour contractors to pay employees’ wages by direct payroll deposit. All farm labour contractors were provided with notice of the new operational policy in a communication from the Director dated May 27, 2003, which stated, in part:

Pursuant to section 5(4) of the Employment Standards Regulation and as a new Employment Standards operational policy **ALL FARM LABOUR CONTRACTORS** must use a direct wage deposit system that has the approval of the director, for all farm workers who are employed for more than 14 calendar days in each licence year.

Your 2003 Farm Labour Contractor licence is conditional on you providing confirmation that you are meeting all of the requirements stated below:

- All farm labour contractors must use a direct wage deposit system for all their farm workers that has the approval of the Director for all employees that are employed for more than 14 calendar days.
- Provide the Employment Standards Branch with a monthly payroll summary of all electronic deposits made on behalf of all individual employees.

The communication also noted that failure to comply with the above requirements could result in a finding that the farm labour contractor had breached a condition of their licence and result in a suspension or cancellation of the licence. It concluded with the following:

You have 60 days, from the date of this letter, (due date - July 25, 2003) to provide evidence to the Branch agricultural enforcement team that an appropriate payroll service has been retained.

On July 30, 2003 another communication was issued to all farm labour contractors relating to the direct deposit operational policy. This communication reminded those contractors who had retained an appropriate payroll service for direct payroll deposit of the obligation to submit monthly payroll summaries of all electronic deposits made on behalf of individual employees. It also stated:

If you **have not** retained the services of an appropriate payroll service for the direct deposit of all employee wages, you must do so immediately and provide confirmation of such by **August 15, 2003.**

Failure to comply with the above by **August 15, 2003**, may result in a finding that you have breached a condition of your licence. A penalty determination may be issued for non-compliance with the Employment Standards Regulation and your licence may be suspended pursuant to section 7(b) of the Employment Standards Regulation (excerpt attached).

The Determination reasons indicate that IS Enterprises had not provided any evidence to the Director of having implemented a direct deposit payroll system and had not provided any monthly payroll summaries of all electronic deposits made. In its analysis, the Determination stated:

As a condition of its licence, IS Enterprises Ltd. was to provide the Employment Standards Branch with confirmation that a direct payroll deposit system had been implemented as well as monthly

payroll summaries of all electronic deposits made on behalf of all individual employees. IS Enterprises Ltd. has failed to provide any evidence of direct payroll deposit to date.

ARGUMENT AND ANALYSIS

This appeal raises several questions relating to the application and interpretation of the *Act* and the jurisdiction of the Director.

Administrative Penalties

As part of its enforcement scheme, the *Act* provides for the imposition of monetary penalties on persons who are found to have contravened a requirement of the *Act* or the *Regulations*. The statutory authority to impose monetary penalties is found in Section 98 of the *Act*:

- 98 (1) *In accordance with the regulations, a person in respect of whom the director makes a determination under section 79 is subject to a monetary penalty prescribed by the regulations.*
- (1.1) *A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.*
- (1.2) *A determination made by the director under section 79 must include a statement of the applicable penalty.*
- (2) *If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.*
- (3) *A person on whom a penalty is imposed under this section must pay the penalty whether or not the person*
- (a) *has been convicted of an offence under this Act or the regulations, or*
- (b) *is also liable to pay a fine for an offence under section 125.*

The Director may only make a Determination under Section 79 of the *Act* where a person is found to have contravened a requirement of the *Act* or *Regulations*. Subsection 29(1) of the *Regulations* sets out a schedule of monetary penalties for “*a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act*”.

Farm Labour Contractors

No person may act as a farm labour contractor unless that person is licenced under the *Act*. Section 5 of the *Regulations* sets out the basic requirements for obtaining a licence:

- 5 (1) *An application for a licence to act as a farm labour contractor must*
- (a) *be made to the director, and*
- (b) *be accompanied by a fee of \$150.*

Subsection 5(2) says the Director may issue a farm labour contractor licence only if the applicant has completed a written application in a form prescribed by the Director, paid the required fee, satisfied the

Director of their knowledge of the *Act* and the *Regulations* and posted security in accordance with subsection 5(3).

The Director has the authority under subsection 5(4) of the *Regulations* to include conditions in a farm labour contractor's licence considered appropriate for the purposes of the *Act*:

- 5 (4) *The director may include in a licence issued to a farm labour contractor any condition the director considers appropriate for the purposes of the Act.*

Section 6 of the *Regulations* imposes a number of duties on a farm labour contractor. None of those duties include a requirement to pay wages by direct payroll system. The Director may cancel or suspend a farm labour contractor licence in certain circumstances. Section 7 of the *Regulations* identifies the circumstances under which a farm labour contractor licence may be cancelled or suspended:

- 7 *The director may cancel or suspend a farm labour contractor's licence in any of the following circumstances:*
- (a) *the farm labour contractor made a false or misleading statement in an application for a licence;*
 - (b) *the farm labour contractor is in breach of a condition of the licence;*
 - (c) *the farm labour contractor or an agent of the farm labour contractor contravenes the Act or this regulation.*

The Questions Raised

As indicated above, the circumstances of this appeal raise a number of important questions under the *Act* and *Regulations*, including whether the Director has any jurisdiction under the *Act* to impose an administrative penalty under Section 29 of the *Regulations* for a breach of a condition of a farm labour contractor's licence, whether subsection 5(4) of the *Regulations* can be breached by a farm labour contractor, whether the Director has jurisdiction to impose a condition under subsection 5(4) of the *Regulations* that wages must be paid by way of direct deposit, whether the Director has the jurisdiction to impose new, or additional, conditions in a farm labour contractor licence during the term of that licence and, assuming an affirmative answer to the first four questions, whether any breach of a condition of the farm labour contractor licence issued to IS Enterprises has been shown.

The first four questions were not raised in the appeal by IS Enterprises, but because they are fundamental to the jurisdiction of the Director to impose the monetary penalty being appealed, the Tribunal is required to raise them with the parties and to consider them. The parties have been notified that these concerns have been identified and have received submissions on them.

The Director says the answer to all of the questions is in the affirmative. The position of the Director starts from the proposition that the Director may include conditions in a farm labour contractor licence at any time, including during the term of the licence, and that a breach by a farm labour contractor of any of those conditions is a contravention of subsection 5(4) of the *Regulations* for which a Determination may be issued and a monetary penalty imposed. The Director says this conclusion flows from the amendments to Section 98 of the *Act* and Sections 28 and 29 of *Regulations*.

The Director says the alternative to issuing a monetary penalty would be to cancel or suspend a farm labour contractor licence under Section 7 of the *Regulations* and issue a Determination to that effect under

Section 10 of the *Regulations*. The Director submits that such a result could have significant consequences to the business of the farm labour contractor and would be inconsistent with the purposes of the *Act* stated in Section 2(b) and (e).

On the question of whether, in the face of Section 20 of the *Act*, it is open to the Director to require wages be paid by direct payroll deposit, the Director essentially submits that any wage payment requirements which are perceived by the Director to be remedial and which further the fundamental statutory objective of ensuring payment of wages may be included as a condition in a farm labour contractor licence. Section 20 of the *Act* states:

20 *An employer must pay all wages*

- (a) *in Canadian currency,*
- (b) *by cheque, draft or money order, payable on demand, drawn on a savings institution, or*
- (c) *by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.*

The Director argues that in any event, and to avoid the requirement in Section 20(c) for written authorization from the employee for direct deposit, the direct deposit scheme contemplated by the condition included in the farm labour contractor licence falls within Section 20(b) and “meets the spirit and intent of Section 2 and 20 of the *Act*”.

IS Enterprises has filed a response which simply reasserts the original grounds of appeal – that IS Enterprises had no employee on their payroll for July, August, September and October, 2003 so did not have to make any direct deposit on their behalf.

Conclusion

This Determination must be cancelled. There are several reasons for reaching this conclusion.

As indicated above, the *Act* allows administrative penalties to be imposed only where a contravention of the *Act* or *Regulations* has been found. To that extent, I take no issue with the argument of the Director that as a result of amendments to the *Act* or *Regulations* in 2002, an administrative penalty may be imposed for any finding of a contravention of the *Act* or *Regulations*.

In this case, the Director submits that the contravention of the *Act* or the *Regulations* was a breach by IS Enterprises of a condition included by the Director in their farm labour contractor licence under subsection 5(4) of the *Regulations*. That submission suggests that a condition imposed in a farm labour contractor licence under subsection 5(4) is a requirement of the *Act* or the *Regulations* and a breach of such condition is a contravention of the *Act* or the *Regulations*. I am unable to accept that submission. There is no indication in subsection 5(4), or in any other provision of the *Act* or the *Regulations*, that a condition included at the discretion of the Director becomes a requirement of the *Act* or the *Regulations*. That is not surprising, since the logical extension of this submission would allow the Director, through the vehicle of subsection 5(4), to expand or diminish specific statutory requirements set out in the *Act* relative to farm labour contractors. That is exemplified in this case, where the licence condition requiring IS Enterprises to pay wages by direct wage deposit has effectively varied the statutory requirement found in Section 20 of the *Act* for paying wages. Suffice to say, it is not open to the Director to create or alter statutory rights and duties that are not reflected, directly or indirectly, in the requirements of the *Act*.

While Section 20 of the *Act* deals with the same subject matter, in that it directs how an employer must pay wages, there is no suggestion in the Determination, on the record or in the submissions of the Director that this provision has been contravened and quite clearly it has not. Subsection 5(4) does no more, in my view, than what it states clearly on its face - give the Director a discretionary authority to include conditions appropriate for the purposes of the *Act* in a licence issued to a farm labour contractor. It neither adds to nor derogates from the minimum statutory requirements found elsewhere in the *Act* and *Regulations* and does not establish an independent statutory obligation to comply with the included conditions.

I am reinforced in this conclusion by a reading of Section 7 of the *Regulations*, which identifies three specific circumstances in which the Director may cancel or suspend a farm labour contractor's licence: for making a false or misleading statement in the application for the licence; for breach of a condition of the licence; and for a contravention of the *Act* or *Regulations*. If the legislature had intended a breach of condition of the licence to be a contravention of the *Act* or *Regulations*, it would have been unnecessary to identify it as separate circumstance from a contravention of the *Act* or *Regulations*.

If I am wrong on the above analysis, I would in any event find the Director has no jurisdiction to require IS Enterprises, or any other employer for that matter, to pay wages in a manner other than as prescribed by Section 20 of the *Act*. As stated above, the Director has no jurisdiction to amend or ignore the requirements of the *Act* and *Regulations*. While the Director has a discretion under subsection 5(4) of the *Regulations*, such discretion cannot not be exercised in a way that is inconsistent with substantive provisions in the legislation. Section 20 directs how wages are paid and does not require wages be paid only by direct deposit unless direct deposit is authorized by the employee in writing or by a collective agreement.

Based on the above conclusions, it is unnecessary to consider or decide whether the Director has shown IS Enterprises has failed to comply with the conditions of their licence. I confess to some reservations about the validity of the explanation provided by IS Enterprises. These reservations are fuelled by the complete failure of IS enterprises to communicate with the Director in order to discuss and clarify their professed confusion over what was required of them under the newly included terms of their farm labour contractor licence in their particular circumstances. Were there not the jurisdictional impediments to the Director's initiative, it is doubtful the excuse given by IS Enterprises in their appeal would have been accepted.

The appeal succeeds.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 4, 2003 be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal