

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 -

Subedar Enterprises Ltd.
("Subedar" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/744, 1999/745 & 1999/746

DATE OF DECISION: February 11, 2000

DECISION

APPEARANCES:

Mr. Joginder Gill on behalf of the Employer

Mr. J.R. Dunne on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against three Determinations of the Director of Employment Standards (the “Director”) issued on November 29, 1999 which imposed a penalty of \$5,250 on the Employer. The Determination found that the Employer had contravened Section 17(1) of the *Act* (requirement to pay semi-monthly) and, as the Employer had previously violated this provision, the penalty was \$150 multiplied by the number of affected employees, in this case 35. A second Determination, issued the same date, imposed a \$500 penalty for “failing to keep proper payroll records”, a contravention of Section 28 of the *Act*. A third Determination, also issued on November 29, 1999, cancelled the Employer’s farm labour contractor licence.

FACTS AND ANALYSIS

Section 98 of the *Act* provides:

98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

As stated in *Narang Farms and Processors Ltd.*, BCEST #D482/98:

“... penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*.”

A. Penalty regarding Section 17 contravention

Turning to the first step in the analysis, the contravention of the *Act*, Section 17(1) provides that an employer must pay wages at least semi-monthly. On October 1, 1999, the Employer was served with a Demand for Employer Records (payroll records and cancelled cheques). A review of the records revealed that 35 named employees were not paid semi-monthly.

The Employer does not dispute the violation of Section 17(1). Rather, the Employer seeks to explain the violation:

“During the subject payroll period after exhausting my operating loan from Royal Bank and use my personal savings, Subedar Enterprises Ltd. was short of funds due to Farmers for whom we supplied our services not paying us. The Farmers had promised us to pay after two weeks from the due payroll dates as Farmers were waiting to get paid for their crops from the canneries.

This delay was discussed with all the employees and all the employees agreeing to get paid after two weeks and confirmed that although it is an inconvenience to them that given the circumstances they will support Subedar Enterprises Ltd. in accepting late payroll by two weeks without any issue.”

The Employer also states that this is the first time in 25 years that this has happened.

The delegate notes that the Employer admits the violation and was aware of the requirement. As well, the delegate notes that this is not the first time the Employer has contravened Section 17(1).

I agree with the delegate. First, there can be no argument that the Employer did not contravene Section 17(1). The *Act* provides for minimum standards of employment. The Employer’s argument that it could not afford to pay, because it had not been paid by the farmers, is without merit. Second, as noted by the delegate, the agreement by the employees to waive their rights under the Act, even if *bona fides*, is of no force and effect (see Section 4 of the *Act*).

I now turn to the second element, the delegate’s exercise of his discretion. The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. The use of the word “may”--as opposed to “shall”-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director’s exercise of discretionary power in the context of an administrative function in a number of cases. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 15:

In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.”

Section 81(1)(a) of the Act requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a

penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. The Employer makes reference to its "clean track record". This is clearly not true. In this case, the Determination makes reference to a second contravention of the same Section: on August 28, 1998, a delegate issued a \$0.00 penalty for a contravention of Section 17(1) of the *Act*. There is nothing in the appeal to suggest that the delegate did not exercise his discretion in a manner that was not for *bona fide* reasons, was arbitrary or based on irrelevant considerations. I disagree with the Employer's suggestion, for which there is no basis, that the penalty was "heavy handed and unreasonable".

The third step is the determination of the actual penalty. Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 29 of the *Regulation* establishes a penalty escalating from \$0.00 to a maximum of \$500.00 for each contravention of a specified provision. The *Regulation* does not require that a penalty has been imposed for the previous contravention; it merely requires a contravention. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a contravention of a specified provision of the *Act* has occurred. Section 29 of the *Regulation* provides (in part):

29. (2) The penalty for contravening a specified provision of a Part of the Act or a Part of this regulation is the following amount:

(b) \$150 multiplied by the number of affected employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on a previous occasion;

In this case, the prescribed penalty is \$150 for each contravention multiplied by the number of affected employees, 35, for a total penalty of \$5,250. The amount of the penalty is correct.

The appeal of this Determination is dismissed.

B. Penalty regarding Section 28 contravention

The circumstances of this Determination are as follows:

"Sharn Kaila, Employment Standards Officer, reviewed the records and observed that employees working for Subedar Enterprises Ltd., were not found in the payroll records. On July 26, 1999, the Agriculture Compliance Team conducted a site visit at Sidhu Farm located on 32787 Townshipline Road, Abbotsford. At this site, three daily logs were obtained from drivers of Subedar Enterprises Ltd.

A review of these daily logs and names obtained from interviews with workers at this site revealed that the payroll records were not complete. The following employees were on the daily logs and were interviewed by members of the Agriculture Compliance Team, but are not in the payroll records of Subedar Enterprises Ltd.: ...”

While the Employer appeals the Determination there is nothing in the appeal concerning this contravention. There is no denial that the contravention occurred. There is nothing to suggest that the delegate exercised his discretion for some improper reason. Finally, there is nothing to suggest that the penalty is not correct (see Section 28 of the *Regulation*). Under Section 112 of the *Act*, an appellant is required to set out the “reasons” for the appeal. The Employer has not set out any reasons.

The appeal of this Determination is dismissed.

C. Cancellation of licence

This Determination notes:

“Subedar Enterprises Ltd. was issued a 1999 Farm Labour Contractor Licence on June 3, 1999, for a total of 100 employees.

On November 29, 1999, Subedar Enterprises Ltd. Was found in contravention of Section 28 of the Employment Standards Act. Subedar Enterprises failed to keep proper payroll records in that all employees were not included in the payroll records. And in accordance with the Act and Regulations a subsequent determination has been issued. Having regard to all the facts surrounding the issuance of the Farm Labour Contractor Licence and subsequent failure to comply with the provisions of the Act and Regulation (as detailed below), I have determined pursuant to Section 7(c) of the Employment Standards Regulation that the farm Labour Contractor Licence of Subedar Enterprises Ltd. be cancelled.

August 18, 1997	Part 5	Requirement for statutory holiday pay
August 28, 1998	17(1)	Requirement for semi-monthly pay-day
June 2, 1999	13(1)	Farm Labour Contractor must be licenced
June 2, 1999	6(4)	Requirement for a daily log
June 2, 1999	6(1)(f)	Duties of a Farm Labour Contractor
November 29, 1999	17(1)	Requirement for semi-monthly pay-day
November 29, 1999	28	Payroll records”

There are no reasons in the appeal as to why the Determination should be set aside. The contravention of Section 28 is under appeal. However, as mentioned above, there are no reasons why, in the Employer's view, the delegate erred. The only grounds of appeal pertains to the Section 17(1) appeal. In my view, there is no merit to that appeal. Given the Employer's history, which is not in dispute, I dismiss the appeal of this Determination.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, November 29, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal