

An appeal

- by -

601581 B.C. 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:** Carol L. Roberts

**FILE No.:** 2003A/274

**DATE OF DECISION:** May 12, 2004

## DECISION

### SUBMISSIONS

On behalf of 601581 B.C. Ltd.:

Paul Wadhowan

On behalf of the Director of Employment Standards:

Sharn Kaila, Ken White

### OVERVIEW

This is an appeal by 601581 B.C. Ltd. (the “employer”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued September 4, 2003. The Director imposed a \$500.00 administrative penalty on the employer pursuant to section 29(1) of the *Employment Standards Regulation, B.C. Reg. 396/95* (the “*Regulation*”) for failing to meet a condition of its farm labour contractor license.

The employer contends that it was not operational on July 25, 2003 and did not have employees at that time, and that the delegate failed to comply with the principles of natural justice.

The Tribunal has determined that this matter can be decided without an oral hearing.

### ISSUE TO BE DECIDED

At issue on appeal is whether the delegate Director erred in imposing an administrative penalty on the employer.

Although not raised by the employer on appeal, the Tribunal requested that the Director respond to several additional issues. Those issues were

- whether the Director had 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 during the term of an existing licence.

Finally, if the answer to any of these questions is yes, a final issue to be addressed is whether the Director has established that the employer has breached a condition of its farm labour contractor licence.

## FACTS

The employer is a licensed farm labour contractor (“contractor”) as defined by section 1 of the *Act*. Section 13 of the *Act* prohibits any person from acting as a farm labour contractor without a licence. Part 2 of the *Regulations* sets out provisions relating to the licensing of farm labour contractors.

On April 15, 2003, the Director issued a notice to all contractors indicating that a “new operational policy” would be announced at a meeting on May 8, 2003, and encouraged all contractors to attend the meeting.

On May 15, 2003, pursuant to section 5(4) of the *Regulation*, the Director established a policy requiring all contractors to pay employee wages by direct payroll deposit. The policy became a condition of the contractor licence.

On May 27, 2003, the Director sent a letter to all contractors which stated, in part, as follows:

Your 2003 Farm Labour Contractors license has been issued on the former provisions of the Employment Standards Regulation and operation policy. Your license will be invalid unless you comply with the following new Regulation and operational policy.

....

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 license 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.

...

...Failure to comply with the above will result in a finding that you have breached a condition of your license and your license will be suspended or cancelled pursuant to section 7(b) of the Employment Standards regulation.

The letter concluded with a paragraph indicating that the contractor was to provide evidence to the Branch, within 60 days of the letter, that a payroll direct deposit system had been set up.

On July 30, 2003, a second letter was sent to all contractors failing to comply with the licensing condition informing them that the failure might result in a penalty determination and possible license suspension. All contractors were required to provide confirmation of their compliance to the Employment Standards Branch by August 15, 2003.

The delegate determined that the employer had not provided any information that it had met the condition of the licence, and that no reasonable explanation had been provided for the failure to meet that condition.

## ARGUMENT

The employer contends that it is a seasonal company, and that, because it was not operational on July 25, 2003, it did not have active employees. It submits that all its employees were laid off on July 19, 2003, and rehired on September 24, 2003. It contends that the payment system had been implemented by that time.

The delegate contends that the employer had sufficient time to set up the payroll system before the issuance of the penalty, and that the employer did not respond to any of the communications. Further, the delegate says that even if the employer was not operational as of July 25, 2003, that would not exempt them from compliance with the licence requirements.

In a submission dated March 25, 2004, the Director's delegate says that the answer to the issues raised by the Tribunal is in the affirmative. The delegate says that sections 5(4) and 10 of the *Regulations* allow the Director to refuse a licence or cancel a suspend a licence issued by the Director under the *Regulations*, and that section 79 of the *Act* gives the Director the power to issue a penalty for a contravention of the *Act* or *Regulations*. The Director says that this authority arises under Section 98 of the *Act* and sections 28 and 29 of the *Regulations*.

The Director also says that the policy of having employees in the agricultural sector paid by direct deposit is consistent with the remedial objectives and purposes of the *Act*, that the Director may require payment of wages by direct deposit as a method of ensuring that wages are paid, and that such requirement meets the obligation and intent of section 20(b) of the *Act*.

Finally, the Director says that section 5(4) of the *Regulations* enables her to impose new or additional conditions on a licence already issued.

## ANALYSIS

I allow the appeal and cancel the penalty determination.

Section 20 of the *Act* provides that an employer must pay all wages... 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. (my emphasis)

Section 29(1) of the *Regulation* provides that the Director may impose an administrative penalty on a person who is found to have contravened a provision of the *Act* or the *Regulations*. Section 28 provides that the penalty for contravening the *Regulations* is \$500.00.

Section 5(4) of the *Regulation* provides that

the director may include in a license issued to a farm labour contractor any condition the director considers appropriate for the purposes of the Act.

Section 5(4) is an empowering provision, allowing the director to establish license conditions appropriate to the purposes under the *Act*. In and of itself, it does not impose any independent statutory obligations on

farm labour contractors. Therefore, in my view, it is not a regulation that can be breached, and for which a penalty can be imposed.

The Director may impose administrative penalties where the *Act* or the *Regulations* have been contravened. However, in the case before me, the Director has imposed an administrative penalty not for the contractor's purported breach of section 5(4), but for the contractor's apparent failure to comply with a condition of a license. A license condition is not a requirement of the *Act* or the *Regulations*, and there is nothing in the *Act* that suggests that a license condition imposed by the Director becomes a statutory or regulatory requirement.

The Tribunal has held that administrative penalties are quasi-criminal penalty provisions (*Royal Star Plumbing, Heating & Sprinkler Ltd.* (BC EST #D034/98) and as such, should only be imposed where there are clear instances of a failure to comply with the *Act* or the *Regulations* (see *Narang Farms and Processors Ltd.* BC EST #D482/98). There is nothing before me that indicates that R & R Management has failed to comply with either the *Act* or the *Regulations*.

Furthermore, the Director cannot, in my view, impose a license condition that contravenes the *Act*. The license condition imposed on R & R Management to pay its employees by direct deposit is contrary to section 20 of the *Act*. Section 20 does not require wages to be paid only by direct deposit unless that method of payment is authorized by the employee in writing.

Even if I am wrong in concluding that the Director is without jurisdiction to impose a penalty pursuant to section 29 for the contractor's failure to comply with licensing requirements, there is no evidence that the employer has in fact failed to comply with either or both of the license conditions. The delegate has determined only that the employer failed to advise the Director that it has met the condition of the license. The delegate conducted no investigation into whether the employer had established a direct deposit system or that it had employees employed more than 14 calendar days.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated September 4, 2003 be cancelled.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**