

An appeal

- by -

Dhadda Enterprises Ltd.
(the "Appellant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/272

DATE OF DECISION: May 12, 2004

THE DETERMINATION

The following is taken directly from the reasons for decision (at pp. 1-2) appended to the Determination:

I. INTRODUCTION

...On May 15, 2003, pursuant to section 5(4) of the [*Regulation*], the [Director] introduced a new operational policy that required all Farm Labour Contractors to pay employee wages by direct payroll deposit...

All licensed farm labour contractors were issued a notice letter outlining the new operational policy and were to provide confirmation by July 25, 2003, that they were using a direct payroll deposit system. On July 30, 2003 a second letter was issued to all farm labour contractors who had failed to comply with the above condition. All farm labour contractors were informed that failure to comply with a condition of their license might result in a penalty determination and a possible license suspension. All farm labour contractors were given an opportunity to respond and were required to provide confirmation to the Employment Standards Branch **on or before** August 15, 2003 in order to meet the condition of their license.

II. ARGUMENT AND EVIDENCE OF THE EMPLOYER

The Employment Standards Branch has not received any confirmation or evidence from [the Appellant] that they have met the condition of their license pursuant to section 5(4) of the [*Regulation*]. No reasonable explanation was provided for the failure to meet the condition of the license.

III. FINDINGS AND ANALYSIS

...As a condition of their license, [the Appellant] 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. [the Appellant] has failed to provide any evidence of direct payroll deposit to date.

IV. CONCLUSION

I find [the Appellant] has contravened section 5(4) of the [*Regulation*] by failing to meet the condition of their license as imposed by the [Director]...

V. ADMINISTRATIVE PENALTY

...As I have found you have contravened section 5(4) of the Regulation, the administrative penalty imposed pursuant to section 29 of [the *Regulation*] is...\$500.

(**boldface** in original)

THE APPELLANT'S POSITION

The Appellant appeals the Determination on the ground that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b) of the *Act*]. More particularly, the Appellant says the following (reproduced from its appeal form):

We have the licence for five persons and currently we are not operating and still in process of looking for work and as soon as we start hiring people we will certainly implement the Direct deposit system. We didn't know that it was necessary till we got the penalty letter.

Other than its appeal form (which includes the above-quoted brief statement), I have no other submissions from the Appellant. The Appellant seeks a Tribunal order cancelling the Determination. The Appellant's submission appears to be twofold: first, it was never served with notice of the changed conditions of licence; second, and in any event, its understanding was that the changed licence conditions would not apply until such time as it actually had employees on its payroll.

In my view, the latter argument might also be characterized as an allegation of error of law [see section 112(1)(a)], the argument being that since the company did not have any employees when the Determination was issued, its obligation to establish a direct deposit payroll system had not yet crystallized. Accordingly, so the argument would proceed, the delegate erred in levying a penalty where there was no actual contravention of any licence condition.

THE DIRECTOR'S POSITION

The Director's position is set out in a 2-page letter to the Tribunal's Vice-Chair dated October 29th, 2003; the delegate also appended the "record" mandated by section 112(5) of the *Act* to this latter document and, as indicated above, I also have the Director's delegate's submission dated March 25th, 2004.

The delegate says that by way of a letter dated April 25th, 2003, all farm labour contractors were invited to and "strongly encouraged to attend" a meeting scheduled for May 8th, 2003 in Abbotsford. This notice stated that "the purpose of the meeting is to introduce a new operational policy that will affect all farm labour contractors for the upcoming harvest season". The April 25th notice did not actually identify or describe what that "new operational policy" might be.

In any event, I understand that those who attended the May 8th meeting were advised that henceforth all farm labour contractors would be required to establish a direct deposit payroll system for their employees.

On May 27th, 2003 a form letter went out, under the Director's signature, advising all farm labour contractors that the terms of their existing 2003 farm labour contractors licence were being changed. The relevant portions of the Director's May 27th letter are set out below:

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

Pursuant to section 5(4) of the [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...

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

(underlining and **boldface** in original)

It should perhaps be noted, at this point, that there was no “new Regulation”; rather, the Director was relying on an existing regulation, namely, subsection 5(4), to add a new condition to an existing licence.

On July 30th, 2003 a second form letter, under the signature of the Director’s delegate who issued the Determination, was apparently forwarded to all farm labour contractors. The delegate’s July 30th letter referred to the Branch’s new operational policy and its previous correspondence and then continued:

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 license. A penalty determination may be issued for non-compliance with the [*Regulation*] and your license may be suspended pursuant to section 7(b) of the [*Regulation*]...

(**boldface** in original)

In his October 29th submission, the Director’s delegate concludes:

The appellant’s assertion that they currently are not operating and still looking for work does not exempt them from setting up direct deposit and providing confirmation of such to the Branch. The company was still licensed during this period and as such setting up direct deposit was required to meet the conditions of their license. As Dhadda Enterprises Ltd. had ample opportunity to meet the conditions of their license but failed to do so, I respectfully submit that the appeal should be denied.

With respect to the four issues raised by the Vice-Chair in her March 17th, 2004 letter to the parties, the Director’s delegate submits that the first two questions should be answered in the affirmative, that the imposition of a “direct deposit” condition in a farm labour contractor’s licence “meets the spirit and intent of section 2 and 20 of the *Act*” and that section 5(4) of the *Regulation* allows the Director to impose new terms or conditions after a farm labour contractor’s licence has been issued.

THE REGULATORY FRAMEWORK

A person must not act as a farm labour contractor unless they hold the appropriate licence [see section 13(1) of the *Act*].

A person may apply for a farm labour contractor’s licence pursuant to section 5 of the *Regulation*. An applicant must, among other things, pay a prescribed application fee, post security and demonstrate (through an oral and/or written examination) their knowledge of the *Act* and *Regulation* (see section 5 of the *Regulation*). “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*”--see *Regulation*, subsection 5(4). A farm

labour contractor's licence normally expires on December 31st of the year in which it was issued, however, in certain circumstances a licence may be issued for a 3-year term (see *Regulation*, section 9).

A licensed farm labour contractor must comply with the duties set out in section 6 of the *Regulation*. Curiously, and perhaps this was an oversight by the draftsman, compliance with the terms and conditions of the licence is not an enumerated duty. In any event, if a licensee fails to comply with the terms and conditions of their licence or otherwise contravenes the *Act* or *Regulation*, the Director may, pursuant to subsections 7(b) and (c) of the *Regulation*, "cancel or suspend a farm labour contractor's licence".

If a person contravenes a requirement of Parts 2 to 8 of the *Act*, they may be charged with an offence under section 125(1) of the *Act*. Further, section 98 of the *Act* authorizes the Director to levy monetary penalties in accordance with the *Regulation*.

Section 29 of the *Regulation* provides, in part, as follows:

29. (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:

(a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of \$500;...

[Note: repeat offenders are subject to penalties of \$2,500 or \$10,000 under subsections (b) and (c)]

(4) If an administrative penalty is imposed on a person, a prosecution under the Act or this regulation for the same contravention may not be brought against the person....

ANALYSIS AND FINDINGS

The Director's delegate levied a \$500 penalty against the Appellant based on the latter's alleged contravention of section 5(4) of the *Regulation*.

In my view, a liberal reading of the Appellant's appeal form (see *Triple S Transmission Inc.*, B.C.E.S.T. Decision No. D141/03) suggests that the Appellant questions the administrative fairness of the process that led to the Determination being issued [section 112(1)(1)(b) of the *Act*], namely, that it was never notified by the Director regarding the modified licence conditions. The Appellant also suggests that the Director erred in law [section 112(1)(1)(a) of the *Act*] by issuing the Determination at a point in time when the company did not have any employees.

Quite apart from the foregoing issues, I am of the view that this Determination is fatally flawed and must, therefore, be cancelled. I am driven to this conclusion for several reasons which are summarized below.

As noted above, the Determination was issued on the particular ground that the Appellant contravened section 5(4) of the *Regulation*.

Section 29(1) of the *Regulation* clearly states that an administrative penalty may be imposed if "a person...contravenes a provision of the Act or this regulation". However, licence conditions that may be imposed by the Director do not, by that fact alone, become "provisions of the Act or this regulation". In

my view, the Director cannot, in effect, create new (or amend existing) provisions of the *Act* or *Regulation* by simply imposing conditions in a farm labour contractor's licence.

Subsection 5(4) of the *Regulation*--as it clearly states--only gives the Director the discretionary authority to include, in a farm labour contractor's licence, those conditions that the Director considers appropriate in light of the purposes of the *Act*. In my view, subsection 5(4) neither adds to nor derogates from the minimum employment standards set out in the *Act* and the *Regulation* nor does this latter subsection establish an independent mechanism for creating minimum statutory or regulatory standards that are inconsistent with the express provisions of the *Act* or *Regulation*.

The Director could have imposed an administrative penalty if the Appellant contravened section 20 of the *Act*--the provision that governs how wages are to be paid. However, there is nothing in the material before me to suggest that the Appellant did, in fact, contravene section 20. Indeed, the only evidence before is that, at the material time, the Appellant did not have any employees on its payroll.

Employees must be paid all wages earned. Section 20 states that employees' wages must be paid via one of three separate methods: a) in Canadian currency (*i.e.*, cash); b) by a cheque or other bill of exchange 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". An employer is only required to pay wages by way of direct deposit if the circumstances set out in subsection 20(c) apply--and those circumstances do not apply in this instance. Clearly, the Appellant's apparent failure to pay wages by way of direct deposit (even if it did have employees who were entitled to be paid wages) did not contravene the *Act*.

If a licensee fails to comply with the conditions of their licence, the Director's remedy may well lie in section 7(b) of the *Regulation*, namely, cancellation or suspension of the person's licence. However, I am not satisfied that the Director has the authority to impose a condition--such as the direct wage deposit condition at issue in this case--that is inconsistent with the express provisions of the *Act* or *Regulation*.

While I am prepared to accept that the Director was proceeding in good faith, and with the welfare of farm workers in mind, when she implemented this new policy regarding the payment of wages, I must also observe that this new policy represents an attempt by the Director to impose a new statutory standard--*i.e.*, to amend section 20 of the *Act*.

Further, the Director chose to implement this new policy by way of *changing the terms* of previously issued farm labour contractor licences. I note that the Director's May 27th letter (see above) stated that the licensee's licence was issued under a former regulatory regime and that the terms of the licence were being changed to account for a new regulatory regime. However, as noted above, the changed licence conditions reflected a change in policy not in the *Regulation* itself.

Although section 5(4) of the *Regulation* authorizes the Director to impose licence conditions when initially issuing a licence, there is nothing that I can see in the *Regulation* authorizing the Director to amend or otherwise change the conditions of an subsisting licence. And yet, that is precisely what seemingly occurred in this case.

Section 5(4) speaks of including conditions "in a licence issued to a farm labour contractor"; it does not refer, in any fashion, to changing conditions in a previously-issued licence. In the ordinary course of events, a subsisting licence expires on December 31st of the issuing year; if the Director wishes to impose

new conditions on a licensee, those new conditions can be imposed as and when the licensee seeks a licence renewal.

The Director, by way of her delegate's March 25th submission, expressed concern about amendments to statutory or regulatory rules that might occur after a licence has been issued (and which could create a conflict between the terms of the issued licence and the amended *Act* or *Regulation*). In my view, this latter concern can be readily addressed by simply requiring the licensee to comply with the provisions of the *Act* and *Regulation* in force during the currency of the licence. However, absent specific regulatory authority, it is my view that the Director cannot unilaterally change the conditions of a subsisting farm labour contractor's licence during its term.

Further, and quite apart from the above analysis, the Appellant's position is that it was never formally notified that the conditions of its existing licence were being changed. Even if one accepts that the Director is entitled to make changes to an existing licence (a notion I find to be untenable), the principles of administrative fairness would dictate that notice of such changes be given to the licence holder. The Appellant, the licence holder in this case, says that it never received any notice of the changes to its licence. That may or may not be so, however, there is absolutely nothing in the evidentiary record before me to indicate that this Appellant was ever formally notified about the changes to its farm labour contractor licence.

Similarly, there is no evidence before me that the Appellant had any employees when the Determination was issued or when the changed licence conditions took effect. The Appellant asserts as much and the Director has not taken issue with that assertion let alone lead any contrary evidence.

The Director, by way of her May 27th form letter, purported to add two conditions to the Appellant's existing licence:

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.

(underlining in original document)

The first condition applied only in regard to those employees who "are employed for more than 14 calendar days"--seemingly not applicable here. The second condition only applied after at least one deposit was made to an employee's account--again, a circumstance that seemingly has no application here. The Determination does not set out any evidence to show that either one of the above two conditions was contravened by the employer in this case.

In sum, I am not satisfied that the Director has proven that the Appellant was properly notified about the changes to its existing licence conditions even if one accepts that the Director was entitled to effect such changes. Further, the Determination, on its face, does not disclose evidence that the Appellant contravened section 5(4) of the *Regulation* even if one were to accept that the failure to pay wages by way

of direct deposit was an actual breach of the licence that could, in turn, be remedied by way of an administrative penalty.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal