Employment Standards TRIBUNAL

An appeal

- by -

G & K Labour Contracting 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/273

DATE OF DECISION: May 12, 2004

DECISION

SUBMISSIONS

J.S. Manku	on behalf of G & K Labour Contracting Ltd.
K. White	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by G & K Labour Contracting Ltd. (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Appellant appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on September 4th, 2003 (the "Determination").

The Appellant is a licensed farm labour contractor (see *Employment Standards Regulation*, section 5). By way of the Determination, the Appellant was assessed a $500 "administrative penalty" pursuant to section 29(1)(a) of the *Regulation.* The penalty was assessed for an alleged failure to comply with a particular condition of the Appellant's farm labour contractor licence, namely, a requirement to establish a direct deposit payroll system.

By way of a letter dated November 20th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based solely on their written submissions and that an oral appeal hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). In that latter regard, and after having reviewed the parties' submissions in this appeal (and in other related appeals), the Vice-Chair sent a further letter to the parties, dated March 17th, 2004, pursuant to which the parties were requested to file further written submissions regarding four issues, namely:

1. Does the Director (through her delegate) have jurisdiction under the *Act* or the *Regulation* to impose a section 29 administrative penalty for a finding of a breach of a condition of a licence?

2. Is section 5(4) of the *Regulation* a provision that can be contravened by a farm labour contractor, within the meaning of section 29 of the *Regulation*?

3. In light of section 20 of the *Act*, does the Director have the jurisdiction to impose a condition under section 5(4) that payment of wages must be by way of direct deposit only?

4. Does the Director have the jurisdiction under section 5(4) to impose new or additional conditions during the term of an existing licence?

Although the Director's delegate filed a submission, dated March 25th, 2004, with respect to the above issues, I do not have any submission from the Appellant regarding these issues.

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 it has new evidence that was not available at the time the Determination was being made [section 112(1)(c) of the *Act*]. In particular, the Appellant says the following (reproduced from its appeal form):

> Cost of setting up is very high. I was checking various places for prices. For 5 employees the setup cost is $300 with Ceridian. Finally my application was approved on 29th Aug 2003, where as application was submitted on 14th Aug 2003. Letter of confirmed A/C was received on 11th Sept 2003 at 9:02 A.M. from Toronto Ceridian's office. It takes approx. 1 1/2 month to setup

> A/C. Once account is setup we have to send a test file. After a test file one can run a production cycle. Therefore given time was not enough. Thanks.

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, although an application was made to set up a direct deposit system in mid-August, 2003, that application was not approved until after the Determination was issued.

Second, the Appellant's reasons for appeal might be characterized as a challenge to the administrative fairness of the Director's actions in this case since the Appellant was not given (it says) a reasonable amount of time to comply with the Director's demands. I would characterize this latter challenge as an assertion that the Director failed to comply with the principles of natural justice in making the Determination [section 112(1)(b)].

THE DIRECTOR'S POSITION

The Director's position is set out in a 2-page letter to the Tribunal's Vice-Chair dated October 28th, 2003; the delegate also appended the "record" mandated by section 112(5) of the *Act* to this latter document.

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 <u>for all employees that are employed for more than 14 calendar days</u>.

> - 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 28th submission, the Director's delegate concludes:

> G & K Labour Contracting Ltd. had ample opportunity to obtain the required services prior to the issuance of the penalty determination by the Branch. No communication was received from the appellant prior to the issuance of the penalty determination...As per their own admission G & K Labour Contracting Ltd. did not put forward an application for direct deposit until August 14, 2003, one day before the final deadline imposed by the Branch.

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 draftsperson, compliance with the terms and conditions of the licence is not an enumerated duty. In any event, if a licencee 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 not given sufficient time to comply with the new licence conditions. The Appellant also specifically says that its "new evidence" shows that it was making a reasonable effort to comply with the new licence conditions.

Quite apart from the foregoing issues (which I find I need not adjudicate in this appeal), 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.

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 did not contravene the *Act.*

If a licencee 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 licencee'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 a 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 licencee, those new conditions can be imposed as and when the licencee 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 licencee 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.

Accordingly, and in light of the above comments, I find that the Determination must be cancelled.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal