

An appeal

- by -

Santokh Randhawa o/a Nihal Labour Contracting

- 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: M. Gwendolynne Taylor

FILE No.: 2003A/268

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 Santokh Randhawa o/a Nihal Labour Contracting (“Nihal”) 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 Nihal 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.

In the appeal, Nihal stated that new information had become available and asked that the Determination be cancelled. Included in the appeal explanation is the statement that the system was up and running by September 4, 2003. Nihal submitted that the branch had been too quick to penalize.

Upon receipt of the appeal, I requested that the Tribunal seek further submissions from the Director and from Nihal, which was done by way of letter dated March 17, 2004. The specific issues that the Tribunal asked for submissions on were:

1. Does the Director have jurisdiction under the *Act or Regulations* 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 *Regulations* a provision that can be contravened by a farm labour contractor, within the meaning of Section 29 of the *Regulations*.
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?

The Director made submissions on each issue posed. Nihal did not make submissions or respond to the Director’s submissions.

ISSUES

The four issues posed by the tribunal, plus Nihal’s:

5. Did the Director err in imposing an administrative penalty on Nihal Labour Contracting for failing to meet a condition of its farm labour contractor licence.

THE FACTS

Nihal 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*. Of particular relevance to this appeal is subsection 5(4) of the *Regulations*, which says:

- 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.*

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 harvest 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 27, 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 requirement 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, the licence being invalid, and could 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).

On behalf of Nihal, on September 3, 2003, Vedd & Company, Certified General Accountant, sent a facsimile transmittal to the Director. The import of that communication was:

In August we had commenced the process but ran into a problem at the bank. BMO have 1 specialist in Toronto that sets up and test runs the EFT system. She went on maternity leave and the replacement person could not find her files for 2 weeks. Then I was on vacation and here we are. Just to inform you that the EFT in [sic] in process and should be up and running within 10 days.

The Determination, dated September 5, 2003, stated that the Director had not received confirmation or evidence that Nihal had met the condition and “no reasonable explanation was provided for the failure to meet the condition of the license.” In the findings and analysis of the Determination, the delegate stated:

As a condition of their licence, Santokh Randhawa o/a Nihal Labour Contracting was to provide the Employment Standards Branch with confirmation that a direct payroll system had been implemented as well as monthly payroll summaries of all electronic deposits made on behalf of all individual employees. Santokh Randhawa o/a Nihal Labour Contracting has failed to provide any evidence of direct payroll deposit.

The Delegate found that Nihal contravened section 5(4) and imposed the administrative penalty of \$500.

A subsequent communication was forwarded from Vedd & Company to the Director on October 3, 2003, in which they provided

- an invoice dated June 13, 2003 as proof of when they commenced the EFT process;
- an explanation of bridging difficulties between two systems and their decision on going with one of the systems;
- a statement that there was a problem getting correct bank account information from employees; and
- copies of input documents showing dates from September 4, onward.

STATUTORY FRAMEWORK

For ease of reference, I have attached Appendices A and B which contain the relevant legislation provision: *Employment Standards Act*, sections 20, 79, and 98; *Employment Standards Regulation*, sections 5, 6, 7, 10, and 29.

Under s. 79 of the *Act*, the Director may make a determination against a person who the Director finds has contravened a provision of the *Act* or *Regulations*. Under s. 98, a person against whom a s. 79 Determination has been made is subject to a monetary penalty as prescribed in the *Regulations*. Section 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*.”

Section 5 of the *Regulations* sets out the procedure for the issuance of a farm labour contractor licence. Under s. 5(4), the Director may attach conditions to a licence.

Section 6 of the *Regulations* sets out duties on a farm labour contractor.

Section 7 of the *Regulations* sets out circumstances which could give rise to the Director cancelling a farm labour contractor’s licence.

ARGUMENT AND ANALYSIS

The jurisdictional issues

The Director responded with an affirmative answer to each of the Tribunal’s four issues.

Issues #1, 2 and 4: The Director submitted that conditions may be included in a farm labour contractor licence at any time, including during the term of the licence, and that a breach of any of those conditions is a contravention of s. 5(4), for which a Determination and a monetary penalty may be issued. The Director submitted that the alternative action, to suspend or cancel the licence, would have significant consequences to the farm labour contractor and would be inconsistent with the principles stated in s. 2(b) and (e) of the *Act*.

Concerning the question of jurisdiction to issue monetary penalties for breaches of a condition of the licence, the Director considered the previous statutory provisions and the recently enacted provisions and concluded that previously the monetary penalty provisions had been more restrictive. In particular, the previous regulation included an Appendix that listed certain sections, the breach of which could result in a monetary penalty. That list did not include s. 5(4). The Director submitted that removing the list removed restrictions.

Issue #3: Section 20 of the *Act* sets out the statutory requirements for how wages are to be paid. The Director submitted that those are minimum requirements and that the Director may impose additional requirements provided they are “consistent with the remedial objectives and purposes of the *Act*.” Although s. 20(c) requires an employee’s authorization for direct deposit wage system, the Director’s policy avoids that requirement while allowing for an employee to opt for a different method of payment. The Director submitted that this “meets the spirit and intention of Section 2 and 20 of the *Act*.”

Nihal’s issue

As noted above, the grounds for the appeal are that the system was close to being implemented and Nihal had communicated that to the Director. In the reply to the appeal, the Director acknowledged the September 3 communication and also noted that “Confirmation of direct deposit being up and running was not received until September 8, 2003.” The Director argued that Nihal had ample opportunity prior to the penalty being issued to set up the direct deposit system.

FINDINGS

The jurisdictional issues

Issue #1: Does the Director have jurisdiction under the *Act or Regulations* to impose a Section 29 administrative penalty for a finding of a breach of a condition of a licence?

I do not agree with the Director that the amendments result in conferring jurisdiction on the Director to impose monetary penalties for breaches of conditions of the licences. The legislation is still very clear that monetary penalties may be imposed only for contraventions of the *Act* and the *Regulations*. There is no statutory provision that elevates a condition imposed by the Director to the status of a requirement imposed by the *Act* or the *Regulations*.

Section 7 of the *Regulations* provides a clear indication that a condition of the licence [7(b)] and a contravention of the *Act* or regulation [7(c)] are separate.

I find that the Director does not have jurisdiction under the *Act or Regulations* to impose a Section 29 administrative penalty for a finding of a breach of a condition of a licence.

Issue #2: Is section 5(4) of the *Regulations* a provision that can be contravened by a farm labour contractor, within the meaning of Section 29 of the *Regulations*.

This issue is addressed in #1. Section 29 provides for monetary penalties for contraventions of the *Act* or *Regulations*, not for breach of a licence condition.

Issue #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?

Section 5(4) permits the director to include “any condition the director considers appropriate for the purposes of the *Act*.” In my view, that does not permit the Director to impose conditions that effectively vary the statutory rights and obligations. Such a provision would be surprising since it would enable the Director to alter the statutory requirements, without the intervention of the legislature.

Section 20 directs how wages must be paid. The Director does not have authority to amend that provision through imposing conditions. The condition that the Director purported to impose is inconsistent with the substantive provisions of s. 20.

Issue #4: I find it is not necessary to address this issue.

Nihal's issue

In the event that I am wrong in the above analyses, I find that this appeal succeeds for 2 additional reasons, elaborated on below. First, I find that the Director is attempting to levy the penalty for a condition that is not contained in the policy directive and is not a condition of the licence. Second, even if penalty had been properly levied, I find that Nihal had provided a reasonable explanation for its delay, which they forwarded to the Director prior to the issuance of the Determination.

It is apparent that the Director viewed the new operational policy as requiring that a direct deposit system be set up. In my view that is not correct.

The basis for the Director issuing the administrative penalty was the new operational policy. That policy imposed the following licensing requirements on Nihal:

- To use a direct wage deposit system that has the approval of the Director to pay all employees that are employed more than 14 calendar days; and
- To provide the Branch with a monthly payroll summary of all electronic deposits made on behalf of each such employee.

I do not find any support for the Director's assertion that Nihal was required to provide the Employment Standards Branch with confirmation that a direct payroll system had been implemented. As indicated above, the conditions included in the policy directive was to *use* a direct payroll system to pay employees employed more than 14 days and to *provide* the Branch with a monthly summary of all such deposits.

At the time the Determination was issued, the Director had no evidence that Nihal failed to comply with either of the two conditions that were included in the policy directive. There was no evidence that Nihal had employees who were employed for more than 14 days. Therefore, there was no basis for the Director concluding that Nihal had failed to meet a condition of their farm labour contractor licence. In the absence of some proof of a contravention, the Determination cannot stand.

Even if I found the Director had properly levied the penalty, I find that the appeal succeeds. From the facsimile of September 3, it was apparent that Nihal was attempting to set up a direct deposit system. I find that the Director acted unreasonably in not accepting Nihal's explanation for the delay. Although Nihal framed the appeal on the grounds of new evidence, in fact, the Director had the September 3 facsimile. I find that the Director erred in failing to observe principles of natural justice, by failing to give Nihal full opportunity to respond prior to issuing the penalty.

The appeal succeeds.

ORDER

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

M. Gwendolynne Taylor
Member
Employment Standards Tribunal

Appendix A

Employment Standards Act, sections 20, 79, and 98

How wages are paid

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.

Determinations and consequences

79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:

- (a) comply with the requirement;
- (b) remedy or cease doing an act;
- (c) post notice, in a form and location specified by the director, respecting
 - (i) a determination, or
 - (ii) a requirement of, or information about, this Act or the regulations;
- (d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
- (e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;
- (f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:

- (a) hire a person and pay the person any wages lost because of the contravention;
- (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
- (c) pay a person compensation instead of reinstating the person in employment;

- (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.
- (3) In addition to subsection (1), if satisfied that an employer has contravened section 39, the director may require the employer to limit hours of work of employees to the hours or schedule specified by the director.
- (4) The director may make a requirement under subsection (1), (2) or (3) subject to any terms and conditions that the director considers appropriate.
- (5) The director must serve an employer with notice of a requirement imposed under subsection (1), (2) or (3), including any terms and conditions imposed under subsection (4).
- (6) A person on whom the director imposes a requirement under this section must comply with that requirement.
- (7) If the director requires a person to pay costs referred to in subsection (1) (f), the amount required to be paid is a debt due to the government and may be collected by the director in the same manner as wages.
- (8) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.

Monetary penalties

- 98** (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement 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.
- (4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Appendix B

Employment Standards Regulation, sections 5, 6, 7, 10, 29

Licensing of farm labour contractors

- 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.
- (2) The director may issue a licence only if the applicant has
- (a) completed a written application in a form required by the director,
 - (b) paid the licence fee,
 - (c) satisfied the director by an oral or written examination, or both, of the applicant's knowledge of the Act and this regulation, and
 - (d) posted security in accordance with subsection (3).
- (3) The security must
- (a) be posted under the *Bonding Act*,
 - (b) be of a type that is listed in section 8 of the Bonding Regulations and is acceptable to the director, and
 - (c) be in the amount directed under section 5.1.
- (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.
- (5) The director may refuse to issue a licence to an applicant who has had a previous licence cancelled.

[am. B.C. Regs. 113/99, s. 1; 197/2003, s. 1.]

Duties of farm labour contractors

- 6 (1) A farm labour contractor must do all of the following:
- (a) carry the farm labour contractor's licence at all times while carrying on the licensed activities and display a copy of the licence prominently on all vehicles used for transporting employees;

- (b) show the licence beforehand to all persons with whom the farm labour contractor intends to deal as a farm labour contractor;
 - (c) immediately notify the director of a change in the farm labour contractor's business or residential address;
 - (d) display prominently at the site where the work is to be performed, and on all vehicles used by the farm labour contractor for transporting employees, the wages the farm labour contractor is paying to employees;
 - (e) ensure that each vehicle used by the farm labour contractor for transporting employees has affixed to it an unexpired inspection certificate in accordance with section 25.02 of the Motor Vehicle Act Regulations;
 - (f) file with the director
 - (i) an up-to-date list of the registration numbers and licence numbers of each vehicle used by the farm labour contractor for transporting employees, and
 - (ii) if the vehicle is owned by the farm labour contractor, copies of the inspection certificate and other records that must be maintained under section 25 of the Motor Vehicle Act Regulations.
- (2) A farm labour contractor who provides transportation to a job site for a farm worker employed by the farm labour contractor and who does not then provide employment for the worker must pay the worker at least the minimum hourly wage for the longer of
- (a) 2 hours, or
 - (b) the time spent from the departure point to the return to that place or to a place that is no further away and is acceptable to the employee.
- (3) Subsection (2) does not apply if employment is not available due to unsuitable weather conditions or any other cause completely beyond the farm labour contractor's control.
- (4) A farm labour contractor must keep at the work site and make available for inspection by the director a daily log that includes
- (a) the name of each worker,
 - (b) the name of the employer and work site location to which workers are supplied and the names of the workers who work on that work site on that day,
 - (c) the dates worked by each worker,
 - (d) the fruit, vegetable, berry or flower crop picked in each day by each worker, and
 - (e) the volume or weight picked in each day by each worker.
- (5) The records required by subsection (4) must
- (a) be in English, and

(b) be retained by the employer for 2 years after the employment terminates, at the employer's principal place of business in British Columbia.

[am. B.C. Regs. 216/98, s. (a); 113/99, s. 2; 307/2002, s. 3; 195/2003, s. 1.]

Cancellation or suspension of farm labour contractor's licence

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.

If a licence is refused, cancelled or suspended

10 On making a determination to refuse to issue, or to cancel or suspend, a licence under this regulation, the director must serve the person who applied for or held the licence with a copy of the determination that includes

- (a) the reasons for the determination, and
- (b) the time limit and process for appealing the determination to the tribunal.

Administrative penalties

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;
- (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of \$2 500;
- (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of \$10 000.

(2) The penalties imposed under subsection (1) apply to the person only in respect of the location where the contravention occurred.

(3) Despite subsection (2), if an employer dispatches an employee from one location to another worksite, a contravention that occurs at that other worksite is considered to be, for the purposes of subsection (1), a contravention at the location from which the employee was dispatched.

(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.

(5) A person who is subject to an administrative penalty under this section must pay the amount to the minister charged with the administration of the *Financial Administration Act*.

(6) Subsections (1) to (5) apply only in respect of contraventions that occur on or after November 30, 2002.

(7) In subsection (8), "**former provisions**" is a reference to sections 28 and 29 and Appendix 2 of this regulation, as those provisions read immediately before November 30, 2002.

(8) The former provisions apply, despite their repeal, for purposes of contraventions of the Act and this regulation that occurred before November 30, 2002.

[en. B.C. Reg. 307/2002, s. 10.]