

An appeal

- by -

Kamal Farming 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 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2006A/76

DATE OF DECISION: August 16, 2006

DECISION

SUBMISSIONS

Kamaljit Dass, for Kamil Farming Ltd.

Ravi Sandhu, for the Director of Employment Standards

OVERVIEW

1. Kamil Farming Ltd. (“Kamil”) is a licensed farm labour contractor under the *Employment Standards Act*, R.S.B.C. 1996, C.113 (the “*Act*”). Section 40.2(2) of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “*Regulation*”) requires that a farm labour contractor pay all wages in Canadian dollars “by deposit to the credit of the farm worker’s account in a savings institution”.
2. Kamil produced to the Director payroll records pursuant to a Demand for Records issued February 13, 2006. A review of those records indicated that Kamil had not paid all of its employees by deposit to the credit of the farm worker’s account in a savings institution. Some workers had been paid by cheque.
3. Kamil was provided an opportunity to respond to the allegation, and acknowledged that they had not complied with section 40.2(2) of the *Regulation*. The reason given for non-compliance was that their accountant was out of town during the pay period when the breach occurred.
4. The Director issued a Determination dated May 31, 2006, finding Kamil to be in breach of the *Act*. In the Determination Kamil was ordered to “cease contravening Section 40.2 of the *Employment Standards Regulation*”. Because the *Act* was contravened, the Director held that an administrative penalty in the amount of \$500 be imposed.
5. On appeal to this Tribunal Kamil acknowledged, as it did before the Director, that the breaches had occurred. It sought cancellation of the penalty because of what it considered to be extenuating circumstances that were in evidence before the Director: the employer’s accountant was out of town and there were problems with their payroll service’s delivery service.
6. The Tribunal sought and received written submissions and determined to hear the appeal through such submissions.

ISSUE

7. In its submission to the Director prior to the Determination and in its submission to the Tribunal, Kamil acknowledges that it breached the *Regulation*. It provided reasons for the breach. It undertook not to breach the *Regulation* in the future.
8. In the circumstances, the fundamental issue in this appeal is whether this Tribunal can cancel an administrative penalty due to extenuating circumstances.

LEGISLATION

9. Under the *Act*, to operate as a farm labour contractor an Employer must be licensed. The *Regulation* in section 5 specifies the requirements for obtaining a licence:
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).
10. Regarding how a licensed farm labour contractor is to pay its employees, Section 40.2 of the *Regulation* prescribes methods of payment:
- 40.2 (1) In respect of the payment of wages to farm workers, farm labour contractors are excluded from section 20 of the *Act*.
- (2) A farm labour contractor must pay all wages to farm workers employed by the farm labour contractor
 - (a) in Canadian dollars, and
 - (b) by deposit to the credit of the farm worker's account in a savings institution.B.C. Reg. 257/2004.
11. The Director found a breach of the *Regulation* and imposed a requirement under Section 79 of the *Act*:
- 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.
12. Section 29 of the *Regulation*, as it read at the time of the Delegate's investigation, provides for the imposition of administrative penalties 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;

- (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.

13. The *Regulation* has been amended since that time to the following:

29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, the following monetary penalties are prescribed for the purposes of section 98 (1) of the Act:

- (a) a fine of \$500 if the director determines that a person has contravened a requirement under the Act, unless paragraph (b) or (c) applies;
- (b) a fine of \$2 500 if
 - (i) after the date of a determination under paragraph (a), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (a), and
 - (ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (a),

unless paragraph (c) applies;

- (c) a fine of \$10 000 if
 - (i) after the date of a determination under paragraph (b), the director determines that the person contravened the requirement referred to in that paragraph subsequent to the determination under paragraph (b), and
 - (ii) that subsequent contravention occurs within 3 years after the date of the most recent contravention of the same requirement in relation to which there has been a determination under paragraph (b).

14. In this appeal nothing turns on the amendments.

DISCUSSION AND ANALYSIS

15. Kamil appeals to this Tribunal seeking relief from paying the \$500 penalty imposed by the Director after determining that there was a breach of the *Act*. Kamil admits to the breach, and did so before the Director. Kamil says there were extenuating circumstances.

16. The extenuating circumstances are that Kamil's accountant was away and thus the payroll was not attended to in the appropriate manner in his absence.

17. The Director says there is no discretion to not impose an administrative penalty once a breach of the *Act* or *Regulation* has been found in a determination. I agree.

18. Prior to the amendments that brought section 79 into its current form, the *Act* expressly conferred discretion on the Director whether or not to impose a penalty: *Rainbow Angels Home Service Club Inc.* BC EST D#470/00.

19. The express conferring of discretion to impose penalties has been removed. In one case the Tribunal found at first instance that there would be some repugnancy with the *Act* to impose an administrative

penalty in the absence of fault, but on reconsideration the Reconsideration Panel held that no such repugnancy was shown: *Summit Security* BC EST #D059/04, *Summit Security* BC EST #RD133/04.

20. Since then, the Tribunal has consistently found that the amendment to section 79 entails that there is no discretion with respect to the imposition of penalties. For example, the *Act* does not recognize “fairness considerations” as providing exceptions to the now mandatory administrative penalty scheme: *Actton Super-Save Gas Stations Ltd.* BC EST#D067/04. See also *K. Girn Enterprises Inc.* BC EST #D077/05.

21. The Tribunal has said:

“Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation”: *Re: N. & G. Retail Inc.* BC EST #D012/06.

22. To the same effect are cases such as *Virtu@ally Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, *Marana Management Services Inc. operating as Brother’s Restaurant*, BC EST #D160/04, and *Kimberly Dawn Kopchuk*, BC EST #D049/05.

23. The mandatory administrative penalty scheme is consistent with the purposes of the *Act*. It is part of a larger scheme to regulate employment relationships in the non-union sector, with a view to ensuring the attainment of minimum employment standards for employees in British Columbia: *Kopchuk* BC EST #D049/05.

24. In the circumstances, in my opinion, the Tribunal does not have the discretion to relieve Kamil from the penalty imposed by the Director. I might add that even if this Panel had the discretion to relieve against the penalty I would not do so in this instance. Kamil, like any employer, is responsible for complying with the provisions of the *Act* whether or not key employees are away at various times.

SUMMARY

25. There is no discretion under the *Act* to relieve against the imposition of an administrative penalty once a contravention of the *Act* has been found by the Director in a determination.

ORDER

26. The appeal is dismissed and pursuant to section 115 of the *Act*, the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal