

An appeal

- by -

Qualified Contractors Ltd.
("Qualified")

- 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

ADJUDICATOR: April D. Katz

FILE No.: 2000/786

DATE OF DECISION: March 2, 2001

DECISION

SUBMISSIONS:

Harbhajan Shoker on behalf of Qualified Contractors Ltd.

J. V. Walton on behalf of the Director

OVERVIEW

The Director assessed a penalty of \$150 against Qualified Contractors Ltd. (“Qualified”) a farm labour contractor licensed under the *Employment Standards Act* (“Act”). The penalty was assessed for failing to keep records of the volume of crop picked in each day by each worker contrary to section 18 of the *Employment Standards Regulation* (“Regulation”) B.C. Reg. 396/95.

ISSUE

The sole issue in this appeal is whether Qualified has shown there was no basis upon which a penalty Determination in the amount of \$150.00

ARGUMENT

Qualified argues that they should not have to keep track of the volume of crop picked in each day by each worker because their employees are all paid on an hourly basis. The Investigative Team interviewed all the employees on July 12, 2000. Qualified provided all the payroll records except the pick cards for each employee. All the employee records and the interviews supported the conclusion that the employees were all paid hourly.

Qualified argues that the requirement under regulations to keep a record of pick information is for the purposes of employees who are paid on a piece work basis. Qualified asks the Tribunal to waive the requirement to keep pick records in section 18 (4) of the *Regulation*.

THE FACTS

There is no dispute on the facts giving rise to this appeal. Qualified is a farm labour contractor, which pays its employees on an hourly basis. Qualified received instructions to comply with the *Act* and *Regulation* when its license was issued on February 14, 2000. One of the requirements listed was to keep a record of the volume of crop picked in each day by each worker as required under section 18 of the *Regulation*

On February 24, 2000 an Employment Standards Officer spoke to Harbhajan Shoker of Qualified. Mr. Shoker indicated that picking cards were only used to monitor productivity. Mr. Shoker said picking cards were not kept because the employees were paid on an hourly basis.

On February 25, 2000 a penalty determination was issued to Qualified finding Qualified in breach of section 18(4) of the *Regulation* and assessing a penalty of \$0.00. The determination was not appealed.

The Compliance Team visited one of Qualified's work sites during the 2000 harvest on July 12, 2000. Employees were interviewed. The employees had their cards.

On August 4, 2000 a Demand to produce payroll records and all the records required under section 18(4) of the *Regulation* was issued to Qualified. Records of the volume of crop picked in each day by each worker were not produced. Prior to issuing the determination under appeal on October 5, 2000 Mr. Shoker confirmed that the records were not kept in compliance with section 18(4).

The Determination found Qualified in violation of section 18(4) of the *Regulation* and assessed a penalty of \$150 after concluding that one employee was affected.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Qualified is appealing the Director's decision to assess a penalty. The Director's authority to issue a penalty is set out in section 98 of the *Act*, which provides as follows.

Monetary penalties

- 98 (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
- (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.

Section 29 (2) (b) of the Regs provides that the penalty is \$150 per employee if the person has contravened the provision on one previous occasion.

In *Narang Farms and Processors Ltd.* BC EST #D482/99 the Tribunal set out a three step process for assessing a penalty.

First, the Director must be satisfied that a person has contravened the Act or the Regulation. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the Regulation.

(See also, *Re James Cattle Co. Ltd.*, BC ESE #D230/99).

There is no dispute about the fact that Qualified has contravened the Regulations. The second step is the exercise of discretion. In dealing with the second step in *Narang Farms* the Tribunal stated that the Director must exercise her discretion reasonably.

The Director's authority . . . is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. . . .

It is not adequate to simply state that the person has contravened a specific provision of the Act or Regulation. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

In the Determination the Director's Delegate has set out the reasons for assessing the penalty. The Determination states that Qualified was aware of this requirement through the Farm Labour Contractor licensing process and had received one previous Determination which found it in

contravention and assessed a penalty of \$0.00 and directed Qualified to comply with the *Regulation*.

In the Director's submission reference is made to the fact that picking cards are the normal method in which producers, farm, labour contractors and employees keep a daily record of the crop and volume picked by each employee each day. These records are a requirement of the *Regulation* and Qualified has chosen to ignore the statutory requirements.

CONCLUSION

Qualified, the appellant, asked the Tribunal to grant an appeal which would waive the statutory requirements to keep records. There is no discretion in the Tribunal to waive statutory requirements.

There was no evidence in the appeal of an error in the Determination. The Determination is therefore confirmed.

The appeal is denied.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated October 26, 2000 be confirmed.

APRIL D. KATZ

April D. Katz
Adjudicator
Employment Standards Tribunal