



An appeal

- by -

Bains Labour Contractor (1999) Ltd.  
("Bains")

- 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.:** 2000/872

**DATE OF DECISION:** March 26, 2001

## DECISION

### SUBMISSIONS:

Sukhjinder S. Grewal

on behalf of Bains Contractor (1999) Ltd.

J. V. Walton

on behalf of the Director

### OVERVIEW

The Director assessed a penalty of \$500 against Bains Contractor (1999) Ltd. (“Bains”) a farm labour contractor licensed under the *Employment Standards Act* (“Act”). The penalty was assessed after a Determination found that 4 employees interviewed at work were not on Bains’ employment records. Bains was found to have failed to keep records of all employees contrary to section 28 of the *Act* and section 18 of the *Employment Standards Regulation B.C. Reg. 396/95* (“Regulation”). Bains had been found in breach of the *Act* and *Regulation*. on August 18, 1997, July 6, 1998, July 5, 1999, September 7, 1999 and July 13, 2000.

### ISSUE

The sole issue in this appeal is whether Bains has shown there was no basis upon which a penalty Determination in the amount of \$500.00 was properly issued by the Director.

### ARGUMENT

Bains argues that they should not be penalized because the employees referred to were not his employees.

### THE FACTS

The dispute on this appeal is based on the findings of fact in the Determination. On July 11, 2000 an Employment Standards Officer did an investigation at a farm. The Officer spoke to the employees referred to during a site inspection. All the employees who were interviewed, indicated they worked for Bains. The farmer indicated that the all the workers in this field were employees of the contractor, Bains. The 4 employees, named in the Determination, were not registered as employees of Bains.

One of the employees was subsequently interviewed and confirmed that she worked on July 11, 2000 with her friend, who was a registered employee of Bains.

The Determination found Bains in violation of section 28 of the *Act* and assessed a penalty of \$500 based on the previous Determinations of breaches of the *Act*.

## ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Bains 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 *Regulation*, 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 *Regulation*, 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 *Regulation* 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 EST #D230/99).

The appeal denies the facts but does not provide any evidence to refute the findings in the Determination. 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 Bains was aware of this requirement through the Farm Labour Contractor licensing process and had received four previous Determinations which found it in contravention of the *Act* and the *Regulation*.

## CONCLUSION

Bains asked the Tribunal to grant an appeal which would waive the statutory requirements to keep records for all employees. 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 December 13, 2000 be confirmed.

***APRIL D. KATZ***

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**