

An appeal

- by -

JKJ Contracting 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

TRIBUNAL MEMBER: John Savage

FILE No.: 2004A/171

DATE OF DECISION: November 30, 2004

DECISION

SUBMISSIONS:

Charanjit Johal, for JKJ Contracting Ltd.

Sharn Kaila, for the Director of Employment Standards

INTRODUCTION

The Director issued a Demand for Records, pursuant to section 85(1)(f) of the *Employment Standards Act*, R.S.B.C. 1996, Chap. 113, to JKL Contracting Ltd. (“JKJ”). JKJ is a licensed farm labour contractor.

JKJ was ordered to produce payroll records, cancelled cheques, and daily log records which are required to be kept under section 6(5) of the *Employment Standards Regulation*, B.C. Regulation 396/95. The records ordered to be produced included the volume or weight of the berry crop picked on each day by each worker.

It was admitted that the records were not kept and therefore were not produced. The decision of the Delegate ordered JKJ to pay an administrative penalty for contravening section 6 of the *Employment Standards Regulation*. Because this was a second breach of the *Act*, the penalty imposed pursuant to section 29 of the *Employment Standards Regulation* is \$2500.00.

The appeal is that the Director failed to observe the principles of natural justice in making the determination. JKJ says that there were no blueberries picked on a per pound basis since the work was done on an hourly basis. There was therefore no need to keep track of the volumes or weight of the crop picked.

JKJ appeals the decision of the Director. This Tribunal has ordered the appeal to proceed by written submissions which have been received from the parties.

ISSUE

The issue in this appeal is whether the Director erred in breaching the principles of natural justice by imposing an administrative penalty for a contravention of the *Act* in the circumstances of this case. The germane circumstance is that arguably the records ordered to be produced were not necessary to determine the wages of the employees.

FARM LABOUR CONTRACTORS

It is an understatement to say that Farm Labour Contractors are highly regulated in British Columbia. Before considering the object and purpose of the statutory regime it is useful to summarize some of the statutory requirements.

A person must not act as a farm labour contractor unless they are licensed pursuant to the *Employment Standards Act* (section 13(1)). A person who engages an unlicensed farm labour contractor is deemed to be the employer of the farm labour contractors' employees (section 13(2)).

Producers and farm labour contractors are jointly and severally liable for the wages of the employees hired by the farm labour contractor unless the farm labour contractor is licensed (section 30(1)).

Only if the farm labour contractor is licensed and the producer can prove that the farm labour contractor has been paid wages for each employee for the work done on behalf of the producer is the producer not liable (section 30(1), 30(2)).

To obtain a licence the farm labour contractor must make an application, pay a fee, satisfy the Director by an oral or written examination that the farm labour contractor is knowledgeable about the *Act* and *Regulation*, post security in an acceptable form in a directed amount (section 5, 5.1, *Employment Standards Act Regulation*). The amount of security is progressively reduced as the period of non-contravention of the *Act* and *Regulation* increases, so that the lowest amount of security is available after a period of three years of non-contravention (section 5.1, *Employment Standards Act Regulation*).

Farm Labour Contractors must keep records and have significant statutory duties. Those records and duties are specified by the *Regulation* as follows:

- 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 licenced 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.

B.C. Reg. 216/98, s. (a); B.C. Reg. 113/99, s. 2; B.C. Reg. 307/2002, Sch., s. 3; B.C. Reg. 195/2003, Sch., s. 1.

DISCUSSION

A consideration of the *Act* and *Regulation* indicates that the object and purpose of this regulatory plethora is to protect the employees of farm labour contractors to ensure they are informed, are paid the wages to which they are entitled, and certain minimum standards are met with respect to their work. To put it another way, it is apparent that the mischief the statutory scheme addresses is the need to protect a vulnerable group. The statutory provisions address this mischief by imposing a strict licensing scheme on farm labour contractors.

JKJ argues that the requirement to keep records of the volume and weight of the crop picked in each day by its employees is unnecessary in the case of employees that are paid hourly.

I agree that in the case of employees that are paid hourly the volume or weight of the crop picked has no bearing on the wages due. A farm labour contractor, however, operates as such only upon receiving the requisite license. The license confers the privilege to engage in this business but only under the regime of the *Employment Standards Act* and *Regulation*.

The regime is imposed in exchange for the license which confers a benefit on the farm labour contractor. The benefit is that producers are encouraged by the regime to contract with licensed farm labour contractors to avoid direct liability for the wages of persons working on their farms.

As noted in *Regina v. Wholesale Travel Group Inc.* (1991) 84 D.L.R. (4th) 161 at page 162:

Those who chose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of the

responsibility. This so-called licensing concept means that those who engage in a regulated activity are deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.

The regime imposed here is to keep records of the crop, volume and weight picked. That information, while not used to determine wages in this instance is information which may be useful to the Director in other circumstances, e.g., in cases where there is a dispute over whether the employees are piece work employees or paid hourly.

In any event, the requirement of the *Regulation* is not ambiguous:

- 6 (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.

The term “must” is mandatory and this Tribunal has found it to require the maintenance of these records even where employees are paid hourly: *J. K. Workforce Ltd.* BC EST # D674/01 (McCabe).

The second argument put forth by JKJ is that “picking cards” were not available from the farmer. In addition, it would be extra labour to require the farmer to measure the volume or weight of the crop picked.

While “picking cards” were apparently not available from the farmer, in this case the *Regulation* requires that a *daily log* be kept by the farm labour contractor of this information. Whether the burden of complying with the *Regulation* can be passed on to the farmer is not relevant; the legal obligation to comply with the *Regulation* obliges the farm labour contractor.

As noted by the Director, in order to obtain the license the farm labour contractor must take an examination which requires familiarity with the requirements of the *Employment Standards Act* and *Employment Standards Regulation* as they apply to farm labour contractors. While this is a highly regulated business, the record keeping requirements of farm labour contractors are not complicated or difficult to understand.

This Tribunal has held that administrative penalties are quasi-criminal penalty in nature: *Royal Star Plumbing, Heating & Sprinkler Ltd.*, BC EST #D034/98. Administrative penalties should only be imposed where there are clear instances of a failure to comply with the *Act* or the *Regulations*: *Narang Farms and Processors Ltd.*, BC EST #D482/98.

In this case there has been a clear breach of the *Regulation*. JKJ admits that they did not keep the records. The imposition of an administrative penalty in these circumstances is not a breach of natural justice as alleged but a statutory requirement. The appeal must fail. The liability for the administrative penalty has been made out.

ORDER

The determination of the Director is confirmed and the appeal is dismissed.

John Savage
Member
Employment Standards Tribunal