

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

D.A.H. Enterprises Ltd.
("D.A.H.")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/180 and 2000/181

DATE OF DECISION: June 6, 2000

DECISION

OVERVIEW

This decision addresses appeals filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by D.A.H. Enterprises Ltd. ("D.A.H.") from two Determinations, the first issued February 25, 2000 and varied March 1, 2000, the second issued March 13, 2000, by a delegate of the Director of Employment Standards ("the Director"). The first Determination concluded that D.A.H. had contravened section 18(4) of the *Employment Standards Regulation* (the "Regulation") and, pursuant to section 29 of the *Regulation*, ordered D.A.H. to pay a \$0.00 penalty. The second Determination concluded that D.A.H. had contravened Section 28 of the *Act* in respect of the employment of Joginder S. Toor ("Toor"), ordered D.A.H. to cease contravening and to comply with the *Act*, and, pursuant to section 29 of the *Regulation*, ordered D.A.H. to pay a penalty of \$500.00.

D.A.H. appeals from the first Determination, alleging that the required records were not its property, were totally useless and redundant, and further, that the requirement to keep the records constituted "systematic harassment and racial discrimination" on the part of the Employment Standards Branch. D.A.H. alleged in its appeal from the second Determination that Toor was not its employee, a witness had lied, the Director's delegate had misunderstood Toor and the witness, and there was no real evidence that Toor was D.A.H.'s employee.

The parties made written submissions in these appeals. D.A.H. offered no submissions in either appeal in reply to the Director's submissions.

ISSUE

The issues to be decided are whether D.A.H. failed to keep records as required by the *Regulation*, and whether Toor was D.A.H.'s employee such that D.A.H. failed to keep records of his employment as required by the *Act*.

THE FACTS AND ANALYSIS

The First Determination

D.A.H. is a farm labour contractor licensed by the Director to employ and supply farm labourers. On July 15, 1999 the Director's Agriculture Compliance Team (the "Team") attended at C & G Dhaliwal Farm Ltd. ("C & G") and encountered 16 of D.A.H.'s employees picking a berry crop. Upon being questioned, some of the employees advised the Team that picking cards were being used at the farm to record the amounts picked by each worker. The Team gave the D.A.H. driver who had brought the employees to the farm a letter notifying D.A.H. that it was required to keep copies of the picking cards and to provide them to the Team when requested to do so.

On August 24, 1999 the Team issued to D.A.H. a demand for employer records, including payroll records and picking cards. D.A.H. did not produce picking cards in response to the demand. The Director's delegate issued the first Determination on February 25, 2000 in regard to the failure to produce picking cards. On March 1, 2000 the first Determination was varied to amend the appeal date deadline.

Section 18(4) of the *Regulation* provides:

18. Farm workers

- (4) *A farm labour contractor must keep records of the following information:*
- (a) *the name of each worker;*
 - (b) *the work site location and dates worked by each worker;*
 - (c) *the fruit, vegetable, berry or flower crop picked in each day by each worker;*
 - (d) *the volume or weight picked in each day by each worker.*

D.A.H. admits that it did not issue picking cards to its employees while at C & G. This is a clear admission that D.A.H. contravened the requirements of section 18(4) of the *Regulation*. Where the Director finds a violation of the *Act* or *Regulation*, section 98 of the *Act* provides:

98. Monetary penalties--(1) *If the director is satisfied that a person has contravened a requirement of this Act of 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.*

The Director's delegate properly applied the 3-step analysis described in *Narang Farms Ltd.*, BC EST Decision No. D482/98 by finding in this case a contravention of section 18(4) of the *Regulation*, exercising his discretion to determine whether a penalty was appropriate in the circumstances, and determining a penalty in accordance with the provisions of section 29 of the *Regulation*.

D.A.H. in its appeal submission does not deny that picking cards were in use by its employees while working at C & G. Rather, D.A.H. asserts that the cards in use did not belong to D.A.H. and were not, therefore, under its control. This is irrelevant to the requirements of section 18(4) of the *Regulation*. As was stated in *Punjab Labour Supply Ltd.*, BC EST #D392/98, all that is required for proper issuance of a penalty under section 29 of the *Regulation* is proof of violation of the *Act* or *Regulation*. Such proof was offered by the Director and by the admission made by D.A.H. No proof was offered by D.A.H. of its assertion of "systematic harassment and racial discrimination" in regard to the requirement to keep picking cards and I, therefore, make no findings in this regard.

The Second Determination

Upon review of the D.A.H. payroll records produced in September, 1999, an Employment Standards Officer (the "Officer") noted that Toor did not appear on those records. The Team attended at C & G and interviewed employees there. Those employees indicated that Toor worked for D.A.H. On October 20, 1999 the Officer telephoned Toor, who confirmed that he had worked for a few days for D.A.H., and that he recalled talking with Team members at C & G. Toor further was able to name the D.A.H. driver on the date of the Team visit to C & G. Toor's wife appears on the D.A.H. payroll records

On November 1, 1999 the D.A.H. driver denied to the Officer that Toor was a D.A.H. employee. The driver told the Officer that Toor was employed directly by C & G. The Officer contacted C & G that same day and was told by a C & G principal that Toor was a direct employee of C & G. The Officer then issued a demand for payroll records to C & G. in February, 2000. Review of those payroll records indicated that Toor was not included as a direct employee of C & G. Upon being contacted again, the C & G principal admitted that Toor was not an employee of C & G, and that she had said otherwise in order to keep her labour contractor, D.A.H., from getting into trouble. The Director's delegate issued the second Determination on March 13, 2000 in light of his conclusion that Toor was employed by D.A.H. and that D.A.H. had contravened the *Act's* section 28 requirement to keep payroll records for employees.

Section 28 of the Act lists clearly the detailed records an employer is required to keep about its employees. In its appeal D.A.H. did not reply to the Director's submissions concerning the later retraction by the C & G principal who had at first stated that Toor was directly employed by C & G. Instead, D.A.H. relied solely upon its appeal's initiating submissions that Toor denied stating he was an employee of D.A.H., and that Toor had not been hired in 1999 because of having a "bad leg." D.A.H. offered as further support of its assertion that Toor was not its employee the statements that the C & G principal had misled the Officer to protect herself rather than D.A.H., and that the Officer and Team members misunderstood statements made by a "couple of bitter people."

D.A.H. appears to be offering motives for lying from Toor and the C & G principal. This version of events cannot be sustained when one considers that the Officer noted Toor was missing from the D.A.H. payroll records because the Team had interviewed Toor during their July, 1999 C & G visit. Team member notes submitted by the Director in this appeal confirm this. Further, if Toor was a C & G employee not on C & G's payroll records, it is contrary to self-interest for the C & G principal to have initially claimed Toor was a direct C & G employee. I conclude, therefore, that Toor was an employee of D.A.H. in July, 1999.

By denying in its appeal that Toor was its employee, D.A.H. in essence admitted that it had failed to keep records concerning its employee, Toor, as required by section 28 of the *Act*. I find that the Director's delegate properly applied the 3-step test from *Narang Farms Ltd., supra*, as described above, and properly issued a penalty of \$500.00 pursuant to the *Regulation's* section 28 schedule of penalties for violations of the *Act's* record requirements.

ORDER

The Determinations issued February 25, 2000 and March 13, 2000 are confirmed.

Michelle Alman
Adjudicator
Employment Standards Tribunal