

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 -

Qualified Contractors Ltd.
("Qualified")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/079

DATE OF HEARING: April 14, 2000

DATE OF DECISION: July 24, 2000

DECISION

APPEARANCES

Harbhajan Shoker: for Qualified Contractors Ltd.

James Walton: for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act* by Qualified Contractors Ltd. (“Qualified”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 4, 2000. In the Determination, the Director’s delegate found that Paramjit Jhutti (“Jhutti”) was working for Qualified and not included in payroll records on July 12, 1999, a violation of Section 28 of the *Act*. The Determination imposed a penalty of \$500 on Qualified pursuant to Section 98 of the *Act*.

Qualified appealed the Determination on the grounds that the incident on July 12, 1999 was a result of a misunderstanding. Jhutti was not in fact working for the Employer, so no violation of the *Act* occurred.

ISSUE TO BE DECIDED

The principal issue to be decided in this case is whether Jhutti was employed by Qualified on July 12, 1999.

FACTS

Qualified is a farm labour contractor, licensed under the *Act* at all times relevant to this case. Harbhajan Shoker (“Shoker”) was a principal of Qualified in 1999.

The July 12, 1999 incident arose out of coordinated compliance program in which the Employment Standards Branch (the “Branch”) participated to ensure that farm workers received their rights under the *Act* and other employment legislation. Agriculture Compliance Teams, composed of representatives of the Director and other government agencies, visit farms, interview workers and review records required by the *Act*. As part of the compliance program, farm labour contractors received an explanation of their obligations under the *Act*. Shoker signed a receipt for the document on June 3, 1999. One of the items in the explanation was a notice that contractors must keep payroll records to include an account of hours worked. It also stated that contractors must maintain records of picking cards when employees are paid under a piece rate system and a daily log of employees.

An Agriculture Compliance Team visited the South Alder Farm on July 12, 1999. Navjin Chohan (“Chohan”), a representative of the Human Resource Development Canada, and a member of the team, testified that normal practice for a team is that one member speaks to a

contractor's driver and obtains the names, social insurance numbers and rate of pay for all employees on the site. Members of the team then speak to a number of workers to verify the information received from the driver. At the South Alder Farm, Chohan spoke to Jhutti who was picking raspberries. According to Chohan, if Jhutti had stated that she was not an employee, Chohan would have noted that fact in the team's records. Chohan did not recall the details of her interview with Jhutti (which was conducted in Punjabi), but was sure that Jhutti was working with other Qualified employees. Chohan's notes indicated that Jhutti did not know the rate of pay that pickers were receiving and that she stated that this was her first day of work. Members of the Compliance Team interviewed all persons working in Qualified's section of the South Pender Farm. According to Chohan, it would be unusual for a non-employee to be working with a contractor's employees. Normally each contractor is assigned to an area on a farm.

Jhutti testified that she went to the farm with her sister, Shoker's wife, about 10:30 a.m. to visit before going shopping in the United States. Her mother-in-law, Gurbax Jhutti, was picking berries at the time. After Jhutti arrived, her sister and mother-in-law drove to the U.S. with Jhutti's children and Shoker's children in her sister's van. Jhutti said that she went into the field to pick berries for her children with the permission of Karamjit Shoker, Qualified's foreman, on the site. Jhutti stayed in the field until her mother-in-law returned from the shopping trip about 11:45, after which she left the farm for a family reunion. Jhutti stated that she told a member of the compliance team, presumably Chohan, that she was not working there and not being paid.

The Determination stated that Gurbax Jhutti, was included in the daily log for July 12, 1999, but was not interviewed by the compliance team.

Karamjit Shoker was the driver and supervisor of Qualified's crew on July 12, 1999. Her job was to pick up workers and drive them to the farm and supervise the operation. She made a log of the pickers in the crew and gave it to the Compliance Team when they appeared that day. Jhutti was not on the list because Karamjit Shoker had not taken her to work in the morning. According to Karamjit Shoker, Jhutti arrived about 10:30 in the morning. Gurbax Jhutti asked her if she could make a short trip to the U. S., and she gave permission. Gurbax Jhutti, her companion and several children returned after 30 to 45 minutes. Payroll records obtained later by the Branch showed that Gurbax Jhutti worked 8 hours on July 12, 1999. She took a one-hour lunch break, not the normal half-hour lunch period. The owner of the farm Harbans Mann ("Mann") was present on July 12. Karamjit Shoker would tell him if a member of the crew was leaving.

Sharn Kaila ("Kaila"), a representative of the Branch, followed up on Chohan's investigation in February 2000. Kaila noted that Chohan had observed Jhutti picking berries, and she was not on Qualified's daily log or payroll records. Gurbax Jhutti was on the log and payroll, but was not one of the employees interviewed on the site. Kaila called Shoker and asked for an explanation of this discrepancy. Shoker replied that Jhutti had not come to work, but had stayed in the field until Shoker's wife (Jhutti's sister) returned from the U.S. Kaila called Shoker again on February 3 and explained that Jhutti was picking berries when she was interviewed and hence was an employee. Shoker replied that Jhutti had only worked for an hour and did not work to be paid, so it was not possible to put her on the payroll. On February 4, 2000, Kaila and James Walton ("Walton") interviewed Shoker. Shoker stated that Jhutti "wasn't working for money"

on July 12 and “did not think about explaining why she was there rather than stating first day worked.”

The Branch obtained a sworn affidavit from Mann, the site foreman at South Alder Farm at the time in question. He stated that he did not give any person permission to pick berries for personal consumption or on a “U pick” basis on July 12, 1999. Nor was he aware that any employee of Qualified leaving the site to go shopping in the United States.

The Director’s delegate presented evidence in the form of a letter to Qualified listing 16 previous Determinations issued against Qualified between May 1998 and July 1999.

ANALYSIS

Shoker appealed the Determination on the ground that Jhuty was never an employee of Qualified in 1999. She had come to South Alder Farm on July 12 to socialize. The farmer had workers from “a number of labour contractors and members of the public on a “U-Pick basis”. The appeal suggested that Harbans Mann could confirm this statement. In oral argument, Shoker insisted that the Determination was the result of a misunderstanding.

The Director’s delegate argued that Qualified had a history of noncompliance with the *Act*. The assertion that members of the public were working on a “U-Pick” basis at the South Alder Farm on July 12 was not supported by any evidence. In fact, Harbans Mann denied that any such arrangement existed. Shoker gave various explanations for Jhuty’s presence in the field. Qualified’s records showed Gurbax Jhuty had worked 8 hours, the same as other members of the crew, yet she had left the field for a time to travel to the U.S. The Agriculture Compliance Team has observed persons working in fields on behalf of other workers and has warned farm labour contractors that this conduct would not be tolerated.

Jhuty herself was consistent in her explanation of the events of July 12 after her initial interview with Chohan. However, she was not forthcoming with Chohan when asked about her status. No evidence supports Qualified’s appeal that members of the public were working in the field that day.

The Director’s delegate described this as a case of credibility. I find that it is not necessary to determine whether Jhuty was telling the truth about her actions in the field. She acknowledged that she was picking berries and putting them into a pail. Qualified’s payroll records show that Gurbax Jhuty worked the same number of hours as other members of the crew who were present for the entire day, an unlikely result based on Jhuty’s account.

The *Act* defines an employee as “a person an employer allows, directly or indirectly, to perform work normally performed by an employee.” Jhuty fell within this definition on the date in question.

A relatively technical violation of the *Act* occurred when Jhuty substituted for Gurbax Jhuty. Shoker had been informed that the Branch would be investigating payroll records in agriculture. He was inconsistent in his explanations for Jhuty’s presence in the field on July 12. In view of

Qualified's past record of violations of the *Act*, the penalty in this case was reasonable, even if I accept Jhutti's statements about her work in the field.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination dated February 4, 2000 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal