

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 -

Sidson Farms Ltd.
("Sidson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATORS: Geoffrey Crampton
Richard Longpre
Mark Thompson

FILE NO.: 98/429

DATE OF HEARING: July 13, 1998

DATE OF DECISION: August 18, 1998

DECISION

APPEARANCES

Tarseam S. Bhullar For the appellant

Adele Adamic For the Director of Employment Standards

OVERVIEW

This is an appeal by Sidson Farms Ltd. (“Sidson”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by the Director of Employment Standards (the “Director”) on June 9, 1998 (the “Determination”). The Determination refused to issue Sidson Farms a Farm Labour Contractor License, relying on Section 10 of the *Employment Standard Regulation* (the “Regulation”).

Counsel for Sidson filed an appeal on July 2, 1998, and he wrote the Registrar of the Employment Standards Tribunal (the “Tribunal”) on July 3, 1998, asking that the appeal “be dealt with on an urgent basis,” since his client was suffering a monetary loss due to the Director’s refusal to grant a license. In response to his request, the Tribunal scheduled a hearing on July 13 and heard evidence and argument on the appeal.

Because of the urgency of the case, the Tribunal issued an interim decision on July 15, 1998 confirming the Determination. The interim decision stated that full reasons for judgment would be issued expeditiously. This decision contains the reasons for judgment.

ISSUES TO BE DECIDED

After discussion with counsel for Sidson and the Director, counsel and the panel agreed that the hearing would address two issues: (i) did the Director make a reasonable effort to give Sidson an opportunity to respond to the allegations against it; and (ii) did the Determination that denied Sidson’s application for a farm labour contractor’s license adequately state the reasons for the Delegate’s decision?

FACTS

Sidson has been a farm labour contractor for approximately 18 years. Mr. Beant Sidhu (“Sidhu”), who testified with the assistance of an interpreter, described himself as the operator of Sidson. He testified that he was licensed as a farm labour contractor under the name of King Road Farm Ltd. in approximately 1981-1983. Under Section 9 of the Regulation (BC Reg 396), a license issued under the regulation:

- a) expires on December 31 of the year in which it is issued, and
- b) is not transferable or assignable.

Some time in the Spring of 1998, Sidson applied for a license for the 1998 harvest season. Sidhu said that he did not need a license earlier in the year because he had not sent workers out to other farms. The Determination stated that the Director refused Sidson's application because of "the frequency and the nature of non-compliance issues."

Under cross-examination, Sidhu acknowledged that he received a letter and a Demand for Employer Records, dated May 29 and May 30, 1997, respectively. The letters were written in English. Sidhu stated that he gave the letter to his son, Kinder Sidhu, who reads and speaks both English and Punjabi. (Kinder Sidhu is a chartered accountant who filed the appeal on behalf of Sidson). The Demand for Employer Records covered the period January 1 through May 28, 1997. According to Sidhu, he provided the records to the Employment Standards Branch promptly. On June 26, 1997, a delegate of the Director issued a Determination against Sidson for violating section 13(1) of the *Act*, i.e., failure to have a farm labour contractor's license, section 17(1) of the *Act*, which requires wages to be paid at least semi-monthly and section 6(1) of the Regulation, which specifies a number of duties of a Farm Labour Contractor to carry and show a license and post wages being paid at a work site. The determination concluded with a warning that the Director may "cancel or suspend" a farm labour contractor's license under Section 7 of the *Act*.

Sidhu testified that he did not have a license because he was not providing workers to other farmers. There are cabins on his farm, and other farmers may have hired workers who were staying there. (Employees of Sidson who work on the company's property are not at issue in this appeal, as the *Act* did not require Sidson to be a licensed farm labour contractor in order to employ them.) After receiving the June 26 determination, Sidhu applied for a license on July 24, 1997. The application described Sidson as a limited company, with Sidhu as president and holder of 100 per cent interest. Navdip Sidhu was listed as a director. The application was to cover 25 employees, and two vehicles were noted for use in transporting workers, although only one license number was stated. An examination accompanied the application, testing applicants on their knowledge of the *Act* and *Regulation* as they pertain to farm labour contractors. The examination is written in English and Punjabi. Sidhu testified that his daughter in law, Navdip Sidhu, took the examination on behalf of Sidson. Question number 8 on the examination asked if the Director could cancel a farm labour contractor's license if he or she was in breach of the condition of the license. The question was correctly answered "true." The subsequent question asked if a contractor whose license was suspended did not have the right to appeal, and the question was correctly answered "false."

Counsel for Sidson objected to the introduction of the documents under review on the grounds that he had not received the documents in advance of the hearing. Counsel for the Director argued that all of the documents in question had been served on Sidson previously and should have been in its possession. The panel ruled that Counsel for the Director

could proceed with the introduction of documents of this type, while Counsel for Sidson had the right to re-examine Sidhu on their contents.

The interpreter read question 8 to Sidhu, who stated that he understood it, but had not discussed it with Navdip Sidhu. She reads and speaks English, but has limited knowledge of Punjabi. Since he had not violated the *Act*, he did not believe there was any reason to discuss the question. Sidhu did not know that his daughter in law had answered 18 of 20 questions on the examination correctly.

Sidson received a farm labour contractor's license at an office of the Ministry of Labour on July 25, 1997. Sidhu signed the license and testified that he knew it was a license and that it expired on December 31, 1997. Sidhu could not identify a package of instructions provided to farm labour contractors by the Ministry of Labour.

A Delegate of the Director issued two determinations on September 12, 1997 involving Sidson. The first determination stated that the delegate had found a violation of Section 6(1)(d) of the Regulation in that wage rates were not posted at a work site. The determination imposed a penalty of \$150. The second determination referred to the previous determination and another determination of June 26, 1997 issued by a delegate of the Director for a violation of Section 6(1) of the Regulation. The second determination cancelled Sidson's farm labour contractor license pursuant to Section 7 (c) of the Regulation and Section 79 of the *Act*.

Sidhu received a new farm labour contractor's license on September 15, 1997. According to Sidhu, he explained to representatives of the Employment Standards Branch that he was not guilty and his license was re-issued. Sidhu was the only person who represented Sidson, and he spoke to a secretary from the Branch. The Determination noted that Sidson's license was cancelled on November 12, 1997. Counsel for Sidson acknowledged that the cancellation was not appealed.

Staff from the Employment Standards Branch visited a farm in Abbotsford on June 2, 1998. They found 13 workers there who said Sidson employed them.

On June 3, 1998, Sidhu stated that he met with Mr. James Walton ("Walton") a Director's delegate. Kinder Sidhu accompanied him. Sidhu stated that he could not recall what transpired at the meeting. The conversation was in both English and Punjabi. The following day, June 4, Sidhu met with Walton in Walton's office. Sidhu was certain that he and Walton were the only persons present. Sidhu testified that the meeting lasted two or three minutes. Someone spoke Punjabi and gave him some papers. He did not understand the papers and left. Sidhu stated that no one told him in Punjabi that he would not get a license. He was told to pay the penalty and "get a letter from the bank" and submit his application.

Counsel for the Director called Prabhdeep Dhaliwal ("Dhaliwal") to testify regarding these events. She was a delegate of the Director and speaks both English and Punjabi. She was not present at the hearing prior to giving her testimony. She introduced a copy of a

“FLC Interview Checklist 1998” which she completed on June 3, 1998 which contained information on a meeting with Sidhu and his daughter in law. An employee of Human Resources Development Canada was also present. The interview lasted approximately 25 minutes. According to Dhaliwal, the purpose of the meeting was to explain an alleged violation of Section 13(1) of the *Act* by Sidson and to hear Sidhu’s “side of the story.”

Dhaliwal completed the checklist form. It indicated that the issue addressed was Sidson’s failure to have a farm labour contractor’s license. Dhaliwal testified that she told Sidhu that his workers had been found working at farm during a routine site visit, and the farmer identified him as a contractor. Sidhu had worked that day with 23 employees and believed that he should be able to act as a contractor because he had filed an application and he had to full a contract with the farmer. Dhaliwal explained that he could not work without a license and that he would be issued a determination with a penalty and explained the appeal process. She told him that Sidhu would not accept the determination without speaking to Walton. Dhaliwal told him that the process would be easier if she served him with the determination rather than mailing it to him. Sidhu agreed but declared that Dhaliwal was harassing him. Dhaliwal testified that Sidhu had expected to receive his license that day, but she told him that he would have to speak to Walton the following day. She stated that she did not tell Sidhu that it was likely that his license would not be issued. She did tell him that Walton would talk with him before the matter went further. Sidhu repeated that Dhaliwal was harassing him and explained it was because she told him that he had received many determinations last year. Sidhu signed the interview checklist acknowledging that he understood the contents of the interview and had received a copy of the checklist.

Dhaliwal also testified about a meeting with Sidhu, Kinder Sidhu, Walton and herself on June 4, 1998 in the offices of the Employment Standards Branch. According to Dhaliwal, the interview lasted an hour. She made notes shortly after the meeting, which she presented in evidence.

Dhaliwal testified that Walton conducted the interview. The purpose was to tell Sidhu that he might not get his license. Kinder Sidhu translated Walton’s remarks into Punjabi for his father. They discussed the previous determination, and Sidhu wanted to tell his story about June 2. According to Sidhu, a farmer had asked him to provide workers, and Sidhu declined because he had no license. The farmer replied that he would pay the workers. Sidhu said that he had provided the farmer with 13 workers. Dhaliwal noted that this explanation differed from Sidhu’s statement on the previous day (June 3), both as to his conversation with the farmer and the number of workers provided. Dhaliwal’s notes stated that Sidhu brought a letter from the farmer stating that he had paid the workers directly. Walton explained to Sidhu that the Director might deny his application. Walton suggested that he submit an application for a license and await the Director’s decision. The interview ended as Sidhu became angry, claiming he was being harassed. Kinder Sidhu and Walton calmed him down and encouraged Sidhu to submit his application and explained his appeal rights.

Walton testified that he met with Sidhu, Kinder Sidhu and Dhaliwal on June 4, 1998, Sidhu having missed a June 1 meeting because of personal legal problems. The meeting lasted almost one hour. Walton testified about the meeting and introduced his notes from it. At the meeting, Walton asked about the 23 employees found working for Sidson on June 2. Kinder Sidhu, who did accounting for Sidson, stated that the company did not put casual workers on the payroll. Walton tried to explain to Sidhu what had led to the Determination, giving him an opportunity to ask questions and discuss his appeal of the Determination and any application for a farm labour contractor's license. Sidhu reiterated that he had received a telephone call from a farmer around June 2, asking for workers. Sidhu explained that he did not have a license, so he could not supply workers to the farmer. Another farmer also had asked him to supply workers. Sidhu offered to provide letters from both farmers saying that they had hired workers directly. When Walton asked him how the workers got to the farm on June 2, Sidhu replied that Sidson had driven them.

When Walton tried to discuss Sidson's history of noncompliance with the *Act* with Sidhu, Sidhu was not interested. Walton then explained to Sidhu his right of appeal and gave Sidhu a written explanation of those rights. Sidson's license had been cancelled twice before, September 12 and November 12, 1997, Walton would tell the Director of Sidson's previous violations. He told Sidhu that the Director was likely to take Sidson's history into consideration in deciding to grant an application for a license. Sidhu became upset. He did not want to apply for a license, but preferred to ask "Victoria" directly. Sidhu asked for and was given the Director's telephone number, and he stated that he would take a delegation to Victoria to deal with the issue.

Under cross-examination, Walton maintained that he had explained to Sidhu that his application might be refused and that he had given Sidhu an opportunity to explain his position. Sidhu was aware of the two previous cancellations of his license, but was not interested in talking about previous violations of the *Act*, only the events of June 2.

After the meeting Walton called the Acting Director of the Employment Standards Branch to tell him what had transpired and provided him with an overview of Sidson's noncompliance. Walton was told that in previous cases of this nature, decisions had been to deny an application for a license after the second cancellation of a license. The Acting Director signed the Determination in question. Walton did not draft the Determination.

Walton issued a determination on June 3, 1998 imposing a penalty on Sidson for operating as a farm labour contractor without a license. That determination was cancelled on June 9 and a second determination restating the same incident on June 2 was issued. The June 9 determination imposed the same penalty and contained additional information about the June 2 incident. Sidson appealed the June 9 determination.

ANALYSIS

In order to expedite the appeal, counsel for Sidson and the Director agreed to limit their arguments to two aspects of the case: whether the delegate provided Sidson with an

opportunity to make a full defense of its position before the Determination; the failure of the Director's delegate to state her reasons for denying Sidson's application for the license. In addition, Mr. Bhullar argued that the reasons for the Determination included a second determination issued on June 3, which was subsequently cancelled and replaced by another determination to the same effect issued on June 9, 1998. Sidson appealed the June 9 determination that replaced the June 3 determination. Therefore, the Determination at issue in this case was invalid because at least one prior determination on which it relied was under appeal.

Counsel for the Director argued that the Director's delegate exercised reasonable discretion in issuing the Determination. The Employment Standards Branch had conducted a lengthy investigation of Sidson. The Determination was issued against a company, not an individual, and the company had directors or officers who were informed about the *Act* and its requirements. In each of the previous determinations issued against Sidson, there had been serious violations of the law. The Director's delegate had two meetings with Sidhu and others who represented Sidson. In the June 4 meeting in particular, the evidence presented demonstrated that Walton told Sidhu and Kinder Sidhu that Sidson was unlikely to receive a farm labour contractor's license. They had full opportunity to explain their position. The Acting Director made his decision based on a reasonable body of evidence. The Acting Director's actions were consistent with the purposes of the statute.

Section 77 of the *Act* states:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The thrust of the appeal based on Section 77 was that Sidson never had an opportunity to respond to the allegations that led the Director's Delegate to issue the Determination.

The evidence before us establishes clearly, contrary to submissions by counsel for Sidson, that the Director's delegate afforded Sidson an opportunity to respond to the results of an investigation, as required by Section 77 of the *Act*. In particular, Sidhu, president of Sidson, had ample opportunity to explain his position regarding the possible denial of a farm labour contractor's license. We find that Dhaliwal explained to Sidhu and his daughter in law on June 3, 1998 the nature of the allegations against Sidson for the June 2, 1998 incident and appeal procedures that would be available to Sidson under the *Act*. On June 4, 1998 Walton told Sidhu in the presence of Dhaliwal and Kinder Sidhu that Sidson might not be granted a farm labour contractor's license. We prefer Walton's evidence to Sidhu on these points. Sidhu argued that Sidson had not violated the *Act* on June 2, but did not address the issue of Sidson's license, despite Walton's efforts.

Walton summarized Sidson's history of determinations under the *Act* to the Acting Director, who ultimately issued the Determination.

The purposes of the *Act*, as stated in Section 2 are to:

- a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
- b) promote fair treatment of employees and employers,
- c) encourage open communication between employers and employees,
- d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*.
- e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
- f) contribute to assisting employees to meet work and family responsibilities.

The procedures Walton and Dhaliwal followed fulfilled the requirements of Section 77 and were consistent with Section 2(a) and (b) of the *Act*. They explained the evidence against Sidson to officers of the company with the assistance of persons who spoke English and Punjabi, including the son of the president of Sidson. They asked for a response. When no reply was forthcoming, they acted quickly, as the law anticipates especially when the work in question is seasonal, as it was in this case.

The Determination stated the reasons for the decision to deny Sidson’s application for a farm labour contractor’s license in the following terms:

A review of Sidson Farms Ltd. history with regard to compliance with the *Employment Standards Act* and the *Employment Standards Regulation* reveals violations of the following sections:

Date	Section
97/6/26	6(1)(a)(b)(d) Employment Standards Regulation Duties of Farm Labour Contractor
97/6/26	13(1) Employment Standards Act Farm Labour Contractor must be licensed
97/6/26	17(1) Employment Standards Act Requirement to pay semi-monthly
98/6/3	13(1) Employment Standards Act Farm Labour Contractor must be licensed

It is also noted that Sidson Farm Ltd. License was cancelled on the following occasions:

Date	Section
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97/9/12	6(1)(d) Employment Standards Regulations Cancellation – Re-issued
97/11/12	28 Employment Standards Act Cancellation

Counsel for the Employer argued that these reasons were insufficient to meet the obligations of Section 81(1)(a) of the *Act*, which states that a determination must contain reasons for the determination.

The *Act* does not specify how reasons are to be stated in a Determination. In this case, the reasons appeared somewhat abbreviated to a reader unfamiliar with the circumstances of this case. Reasons are included to fulfill Section 2(d) of the *Act*, so that the parties affected by a determination understand why the Director's delegate took the action contained in a determination. In this case, the reasons were a recitation of previous determinations issued by the Director or her delegates against Sidson. There were no third parties involved in previous determinations and the Determination under appeal here. Sidson's officers knew the contents of the previous determinations. Each document had been served to the company, and only the June 3 determination had been challenged. We conclude that a reasonable person in Sidson's position would know exactly what evidence was being considered in the decision to refuse the company's application for a farm labour contractor's license.

Counsel for Sidson correctly pointed out that one of the previous determinations cited in support of the Director's delegate's decision was subsequently cancelled and then replaced with another determination which was under appeal at the time of this hearing. Sidson's argument was that this fact should cause the entire determination to be cancelled. Obviously, it would have been preferable had the Determination referred only to previous determinations that were not subject to any challenge. However, the Director's delegate was forced to deal with an application for a farm labour contractor's license brought in the midst of the harvest season, with an applicant who wanted a rapid reply.

It is significant that this appeal is against a Determination in which the Director's delegate decided not to issue a farm labour contractor's license to Sidson. In our opinion, the *Act* does not grant an applicant for a farm labour contractor's license the right to the license. On the contrary, Section 5(2) of the Regulation gives the Director the discretion to grant or refuse to grant a farm labour contractor's license to an applicant. Further, Section 13(1) of the *Act* prohibits a person from acting as a farm labour contractor without a license issued under the *Act*.

Taken together, the *Act* and the *Regulation* grant the Director broad discretionary authority to ensure compliance with the *Act* and to ensure that employers and workers observe standards in the *Act*. Part 2 of the *Regulation* contains a comprehensive framework for the regulation and licensing of farm labour contractors. These provisions, in our view, reflect

the Legislature's intent to ensure that the Director has the authority to regulate the employment relationship of employees, farm labour contractors and growers in this industry. Nothing in the evidence or argument presented to the Tribunal establishes that the Director exercised her discretion in an unfair or arbitrary manner or in a way that is contrary to the purposes of the *Act* or the *Regulation*.

To ensure fair treatment for both employers and employees, the Director's delegate had to act quickly on the basis of information at hand. Delay in reaching a decision would have injured Sidson's interest, although it was the cause of some of the urgency. In this case, there had been three previous determinations based on violations of the *Act* or *Regulation* and a cancellation of Sidson's license only the previous year. Under Sidson's argument, to be fair to all potential parties, the Director's delegate would have had to wait for the expiration of the appeal period for the determination related to the June 2 incident before issuing a determination on the application for a license. That would have delayed the decision on the application for several weeks, assuming that no appeal was filed. In this case, an appeal was filed, so further delay would have ensued. We do not think that the Director should be required to await the outcome of an appeal before issuing a determination in a case such as this. The Director's discretion to grant a license cannot be suspended pending the outcome of an appeal of an earlier determination.

For reasons not in evidence, the June 3, 1998 determination was cancelled and replaced by another on June 9, 1998. The effect of the June 9 determination was the same as the first. In either case, a determination was in effect imposing a penalty related to the June 2 incident when the Determination under appeal in this case was issued.

This panel heard the parties evidence and submissions and was satisfied that:

- 1) the Director made a reasonable effort to give Sidson an opportunity to respond to allegations against it; and
- 2) the Determination in which Sidson's application for a farm labour contractor license was denied stated the reasons for the Director's decision adequately.

We also find that Sidson did not respond to the Director's delegate at the June 4, 1998 meeting when given the opportunity to do so.

This decision does not preclude the Director from approving an application from Sidson for a farm labour contractor's license in the future.

ORDER

For these reasons, the Determination of June 9, 1998 refusing Sidson's application for a farm labour contractor's license is confirmed.

**Geoffrey Crampton
Adjudicator**

**Richard Longpre
Adjudicator**

**Mark Thompson
Adjudicator**