

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 -

S & K Farm Contractors Ltd.
("S & K")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 98/436
DATE OF HEARING: July 20, 1998
DATE OF DECISION: July 23, 1998

July 6, 1998 6(1)*Employment Standards Act* under 15 without
director's permission
Vehicles must be
registered with the
Employment Standards
Branch

S & K relied on the following grounds in making its appeal dated July 7, 1998:

We believe the determination is wrong in its finding of facts;
We are making this appeal due to the fact that farming is our livelihood;
The facts are in dispute because the child in question is a farmer's family member and there were also other member of the family working along with our labor team in his farm; and ...
We don't have any persons under age on our payroll. We understand the Employment Standards Act and Regulations.

A hearing was held at the Tribunal's offices on July 20, 1998 at which time evidence was given under oath or affirmation. S & K did not call any direct oral testimony to establish a factual basis for its appeal and relied solely on a brief, unsworn written statement by Sukdev S. Toor.

ISSUE TO BE DECIDED

The issue to be decided is whether the Determination to cancel the Farm Labour Contractors License which was issued to S & K Farm Contractors Ltd. should be varied, cancelled or referred back to the Director.

FACTS

The factual dispute which is at the centre of this appeal is whether or not an employee under the age of 15 was working for S & K on July 1, 1998 without the Director's permission as required by Section 9 of the *Act*.

Four delegates of the Director visited the Toor farm in Abbotsford, BC at approx. 9:30 a.m. on July 1, 1998. There is no dispute that approximately 45 employees of S & K were employed picking raspberries at that time. There is also no dispute that S & K had transported the employees to the farm in two vehicles which were not registered as required under Section 6(1)(f) of the *Act*. That contravention of the *Act* was described in a Determination dated July 6, 1998 which S & K did not appeal. Furthermore, S & K acknowledged that it had been served with copies of each of the Determinations listed

above. It also confirmed that the only Determination which it is challenging or has ever challenged is the one dated July 6, 1998 which is the subject of this appeal.

James Walton testified that he was one of the four delegates of the Director who visited the Toor Farm on July 1, 1998. He described how all of S & K's employees were picking fruit at the South end of the field, approximately 200 feet from the building near the entrance to the field. The particular location at which S & K's employees were working was confirmed for Mr. Walton by both the farm owner's wife and his son, Joe Toor, and is not disputed by S & K. Members of the Toor family and other workers were picking berries at the North end of the field near the entrance.

Upon his arrival at the South end of the field, Mr. Walton spoke to Karmjeet Khabara to explain the purpose of his visit. Mr. Khabara is a director and part owner of S & K. During his conversation with Mr. Khabara, Mr. Walton testified, he noticed a "young person" picking raspberries in the same area and in the same manner as other pickers who were S & K's employees. He also testified that Mr. Khabara confirmed that S & K did not have a permit to employ a child under the age of 15 and explained that the boy was his 12 year old brother Harjit Khabara. Mr. Walton then provided Mr. Khabara with the forms required to apply for a permit under Section 9 of the *Act* and explained the application process to him. He testified that Mr. Khabara appeared to understand.

Soon thereafter, the farm owner's son (Joe Toor), arrived at the South end of the field. He confirmed for Mr. Walton that all of the workers at that location were S & K's employees and he did not identify the 12 year old boy as a member of his family. Mr. Walton then provided Mr. Toor with the form required to apply for a permit under Section 9 of the *Act*.

Another of the Director's delegates, Narbinder Barn, spoke to Mr. Khabara, in Punjabi, about the boy. Mr. Khabara informed her that the boy was his brother, although he did not give her the boy's name. Ms. Barn testified that Mr. Khabara did not identify the boy as Micky Toor nor did he tell her that the boy was the farm owner's son.

Ms. Barn also testified that she attended a meeting with Mr. Walton on July 6, 1998 at which the duties and responsibilities of a farm labour contractor under Section 9 of the *Act* were discussed with Mr. Harjinder Sidhu, a director and part owner of S & K. At that meeting, she testified, Mr. Sidhu offered two different explanations for the boy's presence at the South end of the field while denying that the boy was one of S & K's employees. His first explanation was that the boy was a relative of Mr. Toor, the farm owner. His second explanation was that the boy had come to the farm with Mr. Khabara. During the meeting, Mr. Sidhu did not identify the boy by name as Micky Toor.

Ms. Barn also testified that she saw only one boy in the field at the Toor farm on July 1, 1998 and that she did not speak to him. Her reason for not doing so was that by the time she arrived at the location where she first saw him picking berries, he was no longer there. However, he was still in the South end of the field when the investigation team left the farm.

At the hearing, S & K tendered a letter dated July 17, 1998 from Mr. Sukdev S. Toor, the farm owner, in support of its appeal. The letter was not in the form of an affidavit and Mr. Toor did not attend to give evidence or to be subject to cross examination. The letter states:

RE: Employment of Child

I, Sukhdev (sic) S. Toor, owner of Farm would like to advise you that my son was working on my farm on July 01/98 when Employment Standards Team came to inspect the farm. Along with my own family I had people working on my farm from S & K Farm Contractors Ltd. My child (Micky 12yrs of age) was somehow understood that he is employee of S & K Farm Contractors Ltd. and these people have been penalized for that. I trust this will satisfy you if you need further information in this regard please call me at (604) 853-9565.

Sincerely,

Sukdev S. Toor

Mr. Sidhu, when cross examined by the Director's counsel, confirmed that he was not at the Toor Farm on July 1, 1998. For that reason he was unable to give any direct evidence about the identity of the boy in question. However, he testified that his partner, Mr. Khabara, does not have a 12 year old brother. He also testified that he does not know a Harjit Khabara. He believes that the contents of Mr. Toor's letter are true. Mr. Sidhu also testified that in the Punjabi language the word for "brother" can be used colloquially to mean either "brother" or "cousin". Therefore, he speculated, Mr. Khabara could have intended to describe the 12 year old boy as his cousin (i.e. Mr. Toor's son) rather than his brother.

ANALYSIS

Under Section 13 of the *Act*, farm labor contractors must be licensed:

Farm labour contractors must be licensed

- (1) A person must not act as a farm labour contractor unless the person is licensed under this Act.
- (2) A person who engages the services of an unlicensed farm labour contractor is deemed for the purposes of this Act to be the employer of the farm labour contractor's employees.

Section 52 of the *Employment Standards Regulation* (B.C. Reg 396/95) gives the Director authority to issue a licence to a farm labor contractor who meets certain specified requirements.

Under Section 7 of the *Regulation*, the Director may cancel or suspend a farm labor contractor's licence:

Cancellation or suspension of farm labour contractor's licence

7. The director may cancel or suspend a farm labour contractor's licence in any of the following circumstances:
 - (a) the farm labour contractor made a false or misleading statement in an application for a licence;
 - (b) the farm labour contractor is in breach of a condition of the licence;
 - (c) the farm labour contractor or an agent of the farm labour contractor contravenes the Act or this regulation.

The Director relied on her authority under Section 7(c) of the *Regulation* to cancel the farm labor contractor licence issued to S & K.

As in all appeals before this Tribunal, the appellant (S & K in this appeal) bears the onus of establishing that the Director has erred in the Determination and, therefore, that it should be cancelled, varied or referred back to the Director under Section 115 of the *Act*. It is significant therefore, that S & K did not call any direct evidence either from Mr. Khabara or from Mr. Toor to establish the factual basis for its appeal. The principle grounds of S & K's appeal is that the findings of fact in the Determination is wrong because "... the child in question is a farmer's family member and there were other members of the family working along with our labor team."

There are several reasons why that submission is not supported by the evidence which was presented to me. First, the evidence given by Mr. Walton and Ms. Barn concerning the location of S & K's employees and its unregistered vehicles at the South end of the field was not challenged. Second, there is no evidence that the child in question was in the presence of other members of the Toor family. On the contrary, both Mr. Toor and Joe Toor confirmed that all of those picking fruit at the south end of the field were S & K's employees. In particular, Joe Toor did not identify this boy as a member of his family. Third, I do not find it reasonable, on the balance of probabilities, that Mr. Khabra's limited language skills could lead him to identify the boy and to spell his name for Mr. Walton as "Harjit Khabra" rather than "Micky Toor". In any event, it is irrelevant whether the 12 year old boy was his brother or his cousin if he was employed without the Director's permission. Fourth, I note that the boy was not identified as Micky Toor during the meeting between Mr. Sidhu and the Director's delegate on July 6, 1998 nor in S & K's appeal dated July 7, 1998. Finally, I note that Mr. Toor's letter does not state where his son, Micky Toor, was located in the field on July 1st. and, therefore, does not preclude the

possibility that he was with other members of his family at the North end of the field near the entrance.

For all these reasons I find, on balance, that the 12 year old boy in question was employed by S & K on July 1, 1998 without the Director's permission, contrary to Section 9 (1) of the *Act*.

As noted above, S & K acknowledged that it had been served with a copy of each of the Determinations listed in the Determination dated July 6, 1998 and that the only issue under appeal is whether it employed an employee under the age of 15 without the Director's permission. I find that the Director did not err in cancelling the Farm Labour Contractor licence which was issued to S & K.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal