

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 -

Junior Contracting Ltd.
("Junior" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE Nos.:	98/505, 98/506, 98/507, 98/508
HEARING DATE:	August 13, 1998
INTERIM DECISION DATE:	August 14, 1998
DECISION DATE:	November 13, 1998

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ISSUES TO BE DECIDED

The issues to be decided in this appeal is whether it was a reasonable exercise of the Director's authority under Sections 79 and 98 of the *Act* to issue the July 15 and 27, 1998 Determinations.

FACTS

Ms. Ranjit Bhangu ("Bhangu"), the president of the Employer, testified on behalf of the Employer, which was licensed as a farm labour contractor on June 23, 1998 until the cancellation of its license. It was licensed for 46 employees.

Mr. James Walton ("Walton") testified that he was part of a three person Agriculture Compliance Team(the "ATC") of the Abbotsford office of the Employment Standards Branch (the "Branch"). The ACT attended at a potato farm on Marion Road on July 10, 1998. At the farm, which I understand from Bhangu's testimony, to be rented and farmed by a Mr. Dhaliwal, the team observed approximately 11 persons working, picking potatoes--it was "obvious that work was being performed". Members of the team spoke to the driver of the vehicle identified as owned by Junior, a Charnjeet Bhangu, the son of Bhangu and, among others, asked him to provide the daily log required by the *Regulation*. He did not have the log, though he indicated that he knew of the requirement, and characterized it as a "nuisance". According to Charnjeet Bhangu, the Employer had, indeed, received correspondence detailing the requirement and a copy of the new *Regulation*. In cross-examination, Walton stated that while he was present at the Marion Road farm on July 10, the actual investigation was conducted by other team members because he was not conversant in Punjabi. He agreed that he had to interject in the conversation between Charnjeet Bhangu and other members of the ACT because the former--as he put it--became "vocal" and "less cooperative".

The Determination stated that employees of Junior were working there at the time. Bhangu agreed that the Employer was present at the potato farm on Marion Road on July 10, 1998. She was not there personally but agreed that her son was there. She admitted that Junior did not keep a daily log of employees at that time. She explained that "no one had asked us to do that". This contradicts Walton's statement that the Employer's representative at the farm acknowledged that the Employer had received a letter concerning the requirement. Bhangu was not there and cannot testify as to what her son--who was not called to give evidence--may have told the ACT members at the time. I note in that regard that the Determination expressly made reference to the statement by Charnjeet Bhangu. Where there is conflicting testimony, I prefer that of Walton (and other witnesses for the Director) over that of Bhangu. In my view, she was an evasive witness and, in the course of the hearing, it became clear to me that she had been less than forthright with the Branch during the investigation.

Walton issued a Determination on July 15, 1998 which found that Junior contravened Section 6(4) of the *Regulation*. The basis for the Determination was:

“On July 10, 1998, the Agriculture Compliance team conducted a farm site visit at a potato farm on Marion Rd. The driver, Charnjeet Bhangu of Junior contracting Ltd., had transported employees to work at this farm site. Charnjeet Bhangu did not have a daily log of the employees of Junior Contracting Ltd. who working at the job site. He was aware of the requirements to have a daily log, but he stated that he had not had the time to complete one.”

On July 27, 1998, members of the ACT conducted a routine visit at Gill Brothers Farm on McKechnie Road. They went onto the property and observed work being performed. They checked the licence plate of a vehicle on the farm and it did not appear to a vehicle registered with the Branch. A relative of the farm owner identified the farm labour contractor as Junior. Walton explained that Kulwant Bhangu, a representative of Junior and Bhangu’s husband, was present at the work site. They asked him for a copy of the daily log. He could not produce the log at the work site but explained that his wife had an appointment with the Branch’s office and that she had the log. Kulwant Bhangu did not comment on the unregistered vehicle. The team contacted the Branch’s office in Abbotsford to confirm that Bhangu had an appointment there, as her husband had explained, and to bring her attention to the unregistered vehicle.

Walton took part in the interview with Bhangu at the Branch office later that afternoon. Ms. Prabheep Dhaliwal (“Dhaliwal”), a Punjabi speaking employee of the Branch working with the Agriculture Compliance Team, was also present. She conducted the interview in Punjabi. In the interview, Dhaliwal and Walton gave Bhangu an overview and encouraged her to “tell her side of the story”.

At the meeting Walton and Dhaliwal first addressed the issue of the unregistered vehicle (Section 6(1) of the *Regulation*). Bhangu told Dhaliwal and Walton that she had faxed the information regarding the vehicle to the Branch office in Burnaby. Dhaliwal explained that they would contact the Burnaby office to confirm this. If Bhangu’s information was correct, no determination would be issued; if, on the other hand, the information was not correct, a determination could be issued and mailed to the Employer. There was no evidence that the Employer, in fact, had forwarded any information to Burnaby as claimed. On the contrary, Walton’s testimony was that no information had been forwarded to the Burnaby office. Bhangu did not dispute or explain Walton’s testimony in that regard. In other words, she was less than forthright with the delegate. In my view, this affects the credibility of her testimony.

Walton explained that he did not review the daily logs, rather he asked Dhaliwal to go with Bhangu to her vehicle to inspect them. Bhangu said she had the logs and showed the records to Dhaliwal. However, according to Walton, she did not have the logs that pertained to her husband’s work site at the Gill Brothers’ farm (and she admitted that). Bhangu’s testimony was, at best, unclear on this point. Bhangu testified, in direct examination, that the Employer instituted a practice of keeping a daily log on July 27, 1998, the same day--incidentally--that she had the scheduled appointment at the office of the Branch in Abbotsford with Dhaliwal. I understood her to say that while she provided all the daily logs to Dhaliwal, she said, as well, that some of those documents were in a van in Ladner--a point which was not cleared up in re-direct. In cross-examination, she agreed that Dhaliwal and Walton had told her that the daily log was not complete.

On the balance of probabilities, I am not persuaded that she brought the all the daily logs as required. In any event, it was clear that Junior did not keep the daily log at the work site on the day in question.

Walton agreed that Dhaliwal had shown him the payroll information and the cancelled cheques supplied by the Employer (for some of the employees). He testified that he did not go through the documents in any great detail. He explained that Dhaliwal had reviewed the payroll documents and had the evidence that all Junior's employees were not paid semi-monthly. She asked Walton--during an informal morning meeting--if there was enough evidence to issue a penalty with respect to all employees as opposed to only those employees for which she had cancelled cheques. Walton testified that he told her that he could not see any gain in maximizing the penalty. Bhangu agreed that the Employer paid monthly, not semi-monthly. Dhaliwal testified that she received payroll records from the Employer on June 30, 1998. At that time, Dhaliwal spoke with Bhangu who agreed that she had paid employees for the month of June on a monthly basis but that she would start paying semi-monthly in July. Bhangu explained that she had thought she could pay employees on a monthly basis. Dhaliwal indicated the review of the records would take some time and that she would contact Bhangu to schedule an appointment. This appointment was scheduled for July 27. Dhaliwal testified that she discussed her findings with respect to the review of the payroll records with Walton that the records and cancelled cheques indicated that employees were paid on a monthly basis. The payroll records indicated that Junior paid all its employees on that basis. However, Dhaliwal had only cancelled cheques for seven employees. I understood that Walton suggested a penalty only for those seven employees. In cross examination, Dhaliwal indicated that she could not recall whether she had shown the cancelled cheques or the payroll records to Walton. She could not recall any specific questions he had asked, only that the questions were those he generally asked about what evidence she had. In cross-examination, as well, Dhaliwal explained that she had not had a formal meeting with Walton about the Junior payroll records, rather she told him during one of the informal morning meetings at the office.

On July 27, 1997, Bull issued three Determinations: one for failure to pay semi-monthly (Section 17(1) of the *Act*); another for failure to keep the daily log (Section 6(1), (a), (b), (d) of the *Regulation*); and a third for the cancellation of the farm contractor licence. Walton's evidence was that the cancellation of the farm contractor licence had been discussed with Bull and that Bull made the decision to cancel the licence. The Determinations had been prepared and signed by Bull in advance of the meeting with Bhangu. Walton stated that in the past he had been persuaded not to proceed with a determination.

One of these Determinations found that Junior contravened Section 6(4) of the *Regulation*:

“On July 27, 1998, the Agriculture Compliance team conducted a routine visit at Gill Brothers Farm located at 13349 McKechnie Road. Kulwant Bhangu, a representative of Junior contracting Ltd., could not produce a daily log of the employees working at the job site.”

A second July 27 Determination concluded that Junior had contravened Section 17(1) of the Act and imposed a penalty of \$150.00 multiplied by the number of affected employees. As the number of affected employees was seven, the total penalty was \$1,050.00. The Determination stated:

“On July 21, 1997, Industrial Relations Officer J.W. Walton issued Junior Contracting Ltd. with a Determination (Copy Attached) in the amount of \$0.00 for the contravention of Section 17(1) of the *Employment Standards Act* (Requirement of at least a semi-monthly payday).

On June 4, 1998 Junior Contracting Ltd. in accordance with the ... *Act* ... was served with a Demand to produce payroll records. These payroll records were received on June 30, 1998 and have now been reviewed.

There are many indications in the records of Junior Contracting Ltd. that some employees are not being paid semi-monthly. The total earnings in the payroll journals are calculated per month. The wage statements are calculated for monthly pay periods and the cheques are issued from monthly earnings. When the issue of monthly payments was discussed with Ranjit Bhangu of Junior Contracting Ltd. by the person conducting the review, she acknowledged that she had been paying her employees one per month.”

A third July 27 Determination cancelling the farm contractor licence stated:

“On July 21, 1997, J.W. Walton, Industrial Relations Officer, issued and served a Determination in the amount of \$0.00 as Junior Contracting Ltd. had contravened Section 17(1) of the *Employment Standards Act*. This Determination was not appealed.

Junior Contracting Ltd. was issued a 1998 Farm Contractor Licence on June 4, 1998.

On July 27, 1998 I found Junior Contracting Ltd. was again in contravention of Section 17(1) of the .. *Act* .. in employees were being paid monthly rather than semi-monthly....

Having regard to all the facts surrounding the issuance of the Farm Contractor Licence and subsequent failure to comply with the provisions of the Act and regulation (as detailed below), I have determined pursuant to Section 7(c) of the *Employment Standards Regulation* that the Farm Contractor Licence of Junior Contracting Ltd. be cancelled.

The Determination then set out an extensive history of contraventions:

Date	Section	
July 21, 1997	17(1) <i>Act</i>	Semi-monthly pay
July 21, 1997	58 <i>Act</i>	Vacation pay
July 21, 1997	Part 5 <i>Act</i>	Statutory holiday pay
July 21, 1997	6(1)(a) <i>Act</i>	Duties of contractor
July 21, 1997	23 <i>Regulation</i>	Overtime
June 5, 1998	13(1) <i>Act</i>	Failure to have licence
June 9, 1998	9(1) <i>Act</i>	Hiring children under 15
June 22, 1998	13(1) <i>Act</i>	Duties of contractor
July 15, 1998	6(4) <i>Regulation</i>	Duties of contractor
July 27, 1998	6(4) <i>Regulation</i>	Duties of contractor

Junior appealed the July 15 and 27 Determinations.

ANALYSIS

1. Definition of a Farm Contractor

At the hearing, Junior argued that it is not a farm labour contractor: its employees worked under the control or direction of Junior, not the farmer. Junior pointed to Section 1 of the *Act* where “farm labour contractor” is defined as “an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product”.

In my view, Junior is clearly a farm labour contractor and the argument--that it is not--has no merit whatsoever. First, Junior raised this argument for the first time at the hearing and not before the Director’s delegate.

Second, and in any event, the *Regulation* prescribes a certain process for obtaining a licence. It is not issued without an application made in accordance with the *Regulation*. Junior would not have received a licence without going through that process. In a determination dated June 23, 1998, which was an exhibit in these proceedings, a delegate of Director determined that Junior “is licensed under the Employment Standards Act to conduct the business of farm Labour Contractor for the year 1998 and may employ a maximum of 46 employees”. The determination was signed by Bhangu. If Junior, against it will, was designated a farm labour contractor, it could have applied to the Director to cancel the Determination under Section 86 the *Act*. Junior did not do that and, in the result, I am not prepared to allow Junior to now argue that it is not a farm labour contractor.

Third, if I am wrong with respect to the above, the licence is *prima facie* evidence of Junior’s status as a farm labour contractor and Junior, which as the appellant has the burden to persuade me that the Determinations should be set aside, did not lead--credible--evidence, which on the

balance of probabilities, would satisfy me that Junior was not a farm labour contractor. The *Regulation* does not require that both control *and* direction be present; it is sufficient that either control *or* direction be present. As pointed out by counsel for the Director, Junior did not call evidence with respect to tools, etc. and other factors which--on the assumption that such evidence was credible--might establish that control or direction resided with someone else than the farmer. In fact, there was precious little evidence on this point. On the other hand, Junior applied for and was granted a licence. Junior and its employees were present on the farms on July 10 and 27, 1998. The employees were observed performing work in connection with an agricultural product. The farmer set the date and place for the performance of the work. In am not persuaded that Junior was not a farm labour contractor at the material time.

2. Standard of Review: Cancellation of farm Contractor Licences

A useful starting point for the analysis is Part 2 of the *Regulation*--Employment Agencies and Farm Labour Contractors. Under Section 5(2) of the *Regulation*, the Director "may"--not "must"--issue a farm labour contractor licence if the applicant otherwise meets four licensing criteria. As well, the Director may include "any condition the Director considers appropriate for the purposes of the *Act*." Under Section 5(5) the Director "may" refuse to issue a licence to an applicant who has had a previous licence cancelled. A farm contractor licence expires December 31 of the year in which it is issued (Section 9, *Regulation*). In my view, the Director has considerable discretion with respect to the issuance and cancellation of farm contractor licences (*Ludhiana Contractors Ltd.*, BCEST #D361/98).

Section 7 of the *Regulation*, permits the Director to cancel or suspend a farm labour contractor's licence and provides as follows:

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 the 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.

As indicated by the word "may", this is a discretionary power.

If a licence is refused, cancelled or suspended by way of a determination, the Director must serve a copy of the determination which includes the reasons for it (Section 10, *Regulation*). The *Regulation* further provides that a determination may be appealed to the Tribunal. Section 12(3) reads:

12.(3) For an appeal under this section,

- (a) the tribunal has the same powers as under sections 114 to 116 of the Act, and
- (b) sections 108, 109(b) to (h) and 111 of the Act apply.

It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a licence cancellation, the Director is exercising a power more akin to an administrative rather than an adjudicative function (see, for example, *Ludhiana*, above). The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in an administrative context. In *Takarabe et al.* (BCEST #D160/98), the Tribunal reviewed the case law and noted at page 14-15:

“In *Jody L. Goudreau et al.* (BCEST #D066/98), the Tribunal recognized that the Director is “an administrative body charged with enforcing minimum standards of employment ...” and is “... deemed to have specialized knowledge of what is appropriate in the context of carrying out that mandate.” The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion under the *Act*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in the law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. *Associated Provincial Picture Houses v. Wednesbury Corp.*, <1948> 1 K.B. 223 at 229.

In *Boulis v. Minister of manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her

discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.”

The following quote from Adjudicator Thornicroft’s decision in *Ludhiana*, above, in my view, illustrates the appropriate standards for the Director’s exercise of the discretionary power under Section 7 (at p. 4-5):

“... Nevertheless, the Director cannot exercise her power capriciously; whether issuing or cancelling a FLCL, the Director is required to address the criteria set out in Sections 5 and 7, respectively, of the *Regulation*. Counsel for the Director submits that a Director’s decision to cancel a FLCL should be entitled to a good deal of deference and the Tribunal ought not to interfere with Director’s exercise of her discretionary power unless it can be shown that the Director failed to act in good faith or took into account irrelevant considerations--see *Glover v. Plasterer et al.*, Victoria Registry No. V02973, February 27, 1998 (B.C.C.A.). In my view, this latter submission correctly sets out the proper approach to be taken by this Tribunal when reviewing a decision by the Director to cancel a FLCL.”

In my view, the onus rests with the appellant to prove that the Director did not act in good faith or took into account irrelevant considerations. In this case, and apart from the allegations discussed under the Employer’s specific grounds of appeal, there was no evidence that the Director’s delegate did not exercise his discretion in good faith or took into account irrelevant considerations. In fact, there are ample reasons provided in the Determination. Simply put, the Employer has a lengthy history of contraventions. In my view, this “history” of contraventions is sufficient (see also *Sidson Farms Ltd.*, BCEST #325/98). Junior knew of the contents of the previous Determinations. Except for the Determinations subject of this appeal, these Determinations stand on their own and cannot now be challenged. If the Employer had doubt about the contraventions dealt with in these Determinations, the Employer could review them. Section 7 of the *Regulation*, permits the Director to cancel or suspend a farm labour contractor’s licence, *inter alia*, where the farm labour contractor or an agent of the farm labour contractor contravenes the *Act* or the *Regulation*. There is no evidence to suggest that the Director’s delegate cancelled Junior’s farm labour contractor licence for any other reason than the contraventions.

3. Standard of Review: Penalties

I now turn to the penalties. The Employer's evidence suggested that it did not know of the requirement to keep daily logs or to pay on a semi-monthly basis. Even if I accepted this evidence--and I do not--the Employer's knowledge of these statutory requirements is irrelevant. Ignorance of the law does not constitute a defence with respect to a finding that contraventions occurred, the administrative penalties imposed (*Aujlas' Farm Ltd.*, BCEST #D428/98), nor, indeed, with respect to the licence cancellation. The *Act* specifically defines "penalty" as "a monetary penalty imposed under Section 98" (Section 1). A licence cancellation is not a monetary penalty under Section 98. It is, therefore, necessary to distinguish between licence cancellations and administrative penalties. However, in both instances, reasons are required.

Section 98 of the *Act* provides:

98. (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

As discussed in *Narang Farms and Processors Ltd.*, BCEST #D482/98, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*.

Turning to the first step, Section 6(4) of the *Regulation* requires the contractor to keep a daily log:

6(4) A farm labour contractor must keep at the work site and make available for inspection to the director a daily log that includes

- a) the names of the employer and the work site location to which workers are supplied, and
- b) the names of the workers who work on that site that day.

I agree with the Director that this provision is not unduly complicated: did Junior keep a daily log at work site as required at the work site? Was it available for inspection? Did it contain the information required? At the hearing, Junior argued that the *Regulation* does not say "when" the daily log must be kept. I disagree. The log must be kept at the work site and must be present at the work site whenever the farm labour contractor and its employees are there. If it is not kept at the work site, it cannot be available for inspection. The requirement that it must be available for inspection similarly implies that it must contain certain information--including the names of the workers "who work on that site that day"-- required at the point in time when it is produced.

There is no support in the *Regulation* for the argument that the log may be filled in “later” and that this would satisfy the *Regulation*.

Similarly, the requirement to pay semi-monthly. Section 17 of the *Act* provides (in part):

17. (1) At least semi-monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

The statutory requirement is simple: pay at least on a semi-monthly basis. Did Junior pay on that basis? If it did not, it contravened the *Act*. In short, Junior contravened the *Act* and *Regulation*.

I now turn to the second element, the delegate’s exercise of his discretion. The Director’s authority under Section 79(3) of the *Act* is discretionary: the Director “may” impose a penalty. The use of the word “may”--as opposed to “shall”-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. The standard of review of the Director’s exercise of discretionary power in this context is the same as in the context of licence cancellations (see above--*Takarabe et al.*, BCEST #D160/98).

Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention.

With respect to the penalty Determinations dated July 15 and 27, I am not satisfied that there is any reason for the penalty apart from a reference to the statutory contravention. This is insufficient. However, there is little doubt that Junior contravened those provisions and I am reluctant, in those circumstances, to cancel the Determinations and I have decided to vary the penalties, striking out the penalty in one case and varying it in the other to a “\$0.00” penalty. This does not interfere with the Director’s discretion because the penalties are, once the decision to impose them is taken, prescribed by regulation. The other July 27 Determination makes reference to a second contravention of Section 17(1). This is sufficient.

The third step is the determination of the actual penalty. Section 98 of the *Act* provides the Director’s delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 29 of the *Regulation* establishes a penalty escalating from \$0.00 to a maximum of \$500.00 for each contravention of a specified provision. The *Regulation* does not require that a penalty has been imposed for the previous contravention; it merely requires a contravention. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her

delegate, has determined that a contravention of a specified provision of the *Act* has occurred. In this case, the number of affected employees is seven (7) and as the penalty is \$150.00 per affected employee, the total, as provided in the Determination, is \$1,050.00.

In my view, the Delegate's reliance upon these contraventions in the cancellation of the farm contractor licence was appropriate. Section 7(c) of the regulation speaks to contraventions of the *Act* or the *Regulation*.

In so far as the above does not dispose of the grounds of appeal, I now turn to the specific grounds of appeal.

3. Lack of Particulars in the Determinations

Junior argues that all of the Determinations are void as they failed to provide sufficient particulars to allow it to make a full answer and defence. In my view the Determinations provided sufficient particulars to allow Junior to make a full answer and defence. The Determinations set out the date, place, nature of the alleged contravention, *i.e.*, the factual basis for the Determinations, and referred to the relevant statutory provision. Where relevant, the Determinations referred previous contraventions. Junior, therefore, has sufficient particulars to appeal the Determination. Junior could, for example, provide *viva voce* evidence and produce payroll records and other documents to prove that, in fact, it did pay on a semi-monthly basis or that it did, in fact, keep the daily log as required. As mentioned above, the license cancellation Determination set out the Employer's contraventions of the *Act*. In short, the Determinations are sufficiently particularized.

4. Delegation

Junior argues that the Director did not, in fact, delegate the power to cancel Junior's farm contractor licence, and relies, among other things, on certain documents. One of the exhibits--an identification card of Bull, signed by Ms. Jill Walker ("Walker"), the Director at the material time--indicates that Bull had the powers of the Director in accordance with the matrix. A letter from Walker, dated June 2, 1997, to Walton--Bull received a similar letter around the same time (as did, a number of employees of the Branch)--stating that the Director delegates certain functions to Walton "as set out in the attached matrix" for an industrial Relations Officer and "revokes any earlier delegation". The matrix did not include the power to cancel farm labour contractor licences for industrial Relations Officers, such as Bull and Walton, though it did indicate that they had the power to issue licences. Walker testified that it was an oversight.

Walker testified that apart from the power to delegate, all other powers of the Director are delegated. Walker was neither certain as to when precisely she delegated the power to cancel licences nor did she recall any specific words she used to delegate the power. However, she was certain that she spoke with Bull and Walton about the *Regulation* and licences and, in the spring and summer 1997, had numerous meetings with them on farm contractor issues. It was her understanding that Bull and Walton had the authority and she was aware that they exercised that power.

In my view, delegation is a question of fact. The Employer's argument that the delegates did not have the authority to cancel farm contractor licences because the "matrix" referred to on the identity card did not expressly provide so, and the June 2, 1997 letter cancelled earlier delegation, is flawed. I agree with the Director that there is no requirement in the *Act* that delegation is in writing. The only requirement in the *Act* is in Section 117(4) which provides that a "person who claims to be carrying out a function, duty or power delegated ... must, on request, produce evidence of the delegation". The identity card, the "matrix" and the June 2 letter are, in my view internal Branch documents which may, or may not, provide evidence with respect to the issue of whether there was in fact lawful delegation of specific functions, duties and powers at the material time. The evidence was that the matrix was revised from time to time. I agree that it is immaterial, in the circumstances, that Walker could not recall the specific date and words used to convey the delegation. The evidence that Walton and Bull cancelled licences, that the Director was aware of this, and took no step to stop this--is consistent with a conclusion that Bull and Walton did, in fact, have the authority to cancel licences on behalf of the Director.

5. The Director's Power to Delegate Cancellation of farm Contractor Licences

Junior argues, as well, that the Director did not have the authority to delegate the power to cancel farm contractor licences based on Section 117(1) of the *Act* which says that the Director may delegate functions, duties or powers "under this *Act*" while elsewhere in the *Act* --for example, in Section 98(1)--the phrase "Act and regulations" is used. If the legislature had intended the ability to delegate with respect to the Regulation, it would have expressly so provided by adding the words "and *Regulation*". On its face, this is an attractive proposition which I, nevertheless, reject.

The Director draws my attention to Section 13 and 127(2)(c) of the *Act*. Section 13 reads (in part):

13.(1) A person must not act as a farm labour contractor unless the person is licensed *under this Act*. (Emphasis added)

Moreover, Section 127(2)(c) reads:

127.(2) Without limiting subsection (1), the lieutenant Governor in Council may make regulations as follows:...

(c) respecting the licensing of employment agencies and farm labour contractors and the suspension or cancellation of their licences ...

First, it is clear from Section 117 that the legislature intended that powers under the *Act* be exercised in a delegated fashion. Section 117 gives the Director a broad discretion to delegate any of her functions, duties and powers under the *Act*. Her discretion is limited in three respects: first, she cannot delegate the power to delegate; second, she cannot delegate the function of investigation (under Section 76) and the power to impose a penalty in relation to that matter to the same person (this limitation also applies to the Director herself); and, third, the delegation may be cancelled

and made subject to appropriate conditions. While Section 117(1) refers to the *Act* only, when read in the context of Sections 13 and 127, the power to delegate may be inferred. Section 13 requires farm labour contractors to be licensed under the *Act*. Section 127 then provides expressly that the Lieutenant Governor in Council may make regulations with respect to “licensing of ... farm labour contractors and the suspension or cancellation of their licences”. Part 2 of the *Regulation* provides a framework for licensing, suspension and cancellation of farm contractor licences. The licensing requirement is set forth in the *Act* and regulated in *Regulation* under the *Act*. The power is under the *Act* and can, therefore, be delegated.

6. Section 117(2)

Junior also argues that the penalty in the July 15 Determination was improperly imposed because Walton was both the investigator and the person who issued the “\$0.00” penalty for a contravention of Section 6(4) of the *Regulation* contrary to Section 117(2) of the *Act*. Walton had asked questions when the ACT attended the farm at Marion Road. Junior also argued that Walton acted as both the investigator and the person who issued the penalty with respect to the July 27 Determinations. Junior points to Walton being present at the Gill Brothers’ farm, that he spoke with Kulwant Bhangu regarding the daily log, discussed the log with Bhangu, and dispatched Dhaliwal to confirm whether Bhangu had the log. He made the decision to issue the July 27 Determinations.

The burden is on the appellant, here the Employer, to prove that the Director’s delegate exercised his authority in a manner contrary to the *Act* and the *Regulation*. On the evidence, and on the balance of probabilities, I am not satisfied that Walton acted both as the investigator and the person who issued the penalty contrary to Section 117(2) of the *Act*. While Walton was present at the farm on July 10, I am satisfied that his involvement in the actual investigation was limited. On his own testimony he only spoke with Charnjeet Bhangu when the latter became “vocal” and “less cooperative”. Other members of the ACT conducted the investigation, leaving Walton to issue the Determination. The July 27 Determinations were issued by Bull. Walton was involved in the investigation but he did not issue the Determinations. On the evidence, the Determinations were prepared and signed before the meeting.

6. Application of Charter of Rights

In the written appeal, August 2, 1998, the Employer argued:

“V. That the Director’s Delegates have failed to observe the Canadian Charter of Rights and Freedoms:

- a) to advise the appellant of their (sic) right to counsel; and
- b) that the “industry-wide” audit that is being conducted by the Employment Standards Branch offends section 8 of the Canadian Charter of Rights and Freedoms, and as relief industry-wide audits should be disallowed.

By letter dated August 7, 1998, received by the Tribunal on August 10, the Employer made an “application to allow for short notice to served the Attorney General with “Notice” as required under the *Constitution Question Act* ...” By letter dated August 10, 1998, the Director opposed the application and says that the Tribunal does not have the jurisdiction to waive the statutory notice requirements and seeks a preliminary ruling from the Tribunal that it will not consider the validity of Section 85 of the *Act* under the *Canadian Charter of Rights and Freedoms*. The requirements of Section 8 of the *Constitution Question Act*, requiring notice to the Attorneys General, where the constitutionality of a statute is challenged, is mandatory (*Eaton v. Brandt County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.)).

In view of the hearing scheduled for August 13, I decided to deal with the applications at the hearing. The Employer insists that I have the jurisdiction to make an order shortening the notice requirements and to consider the constitutionality of Section 85. Counsel for the director argues that I do not. In the alternative, Junior also makes an application for an adjournment with a suspension of the cancellation of the licence.

I was not prepared to rule that the Tribunal does not have the jurisdiction to consider the validity of Section 85 of the *Act*. As I understand the law, the Tribunal may address *Charter* issues if it has the jurisdiction over the whole of the matter before it (*Cuddy Chicks v. Ontario (Labour Relations Board)*, <1991> 81 D.L.R. (4th) 121 (S.C.C.)). In this case, all of the issues arose out the *Act* and *Regulation*, specifically penalties and a licence cancellation. The Tribunal has broad powers to “decide all questions of fact or law arising in the course of an appeal or review” (Section 107(2)). However, that being said, I am not prepared to allow the Employer to challenge the constitutionality of Section 85 due to defective notice pursuant to the *Constitution Question Act* which provides for certain mandatory notice requirements (*Eaton v. Brandt County Board of Education*, above). Even if I have the power to alleviate against the notice requirements, I am not prepared to do so in the circumstances of this case. There is no evidence of any special circumstances (in fact, counsel for Junior did not call any evidence at the time) and, apart from the quote, above, the nature and *prima facie* merits of the constitutional argument was unclear. It is by no means obvious that there is a right to counsel in matters arising under the provincial employment standards legislation or that “industry-wide” audits offends the *Canadian Charter of Rights and Freedoms*. As the appellant in this matter, Junior has the burden to persuade me that its claim was not frivolous. In the result, I agree with the Director to the extent that the constitutional validity of Section 85 will not be heard at this hearing, which is an expedited hearing at the Employer’s request.

If, in the course of the hearing, other constitutional issues arose, I decided to deal with them at such time as they arose. I agreed with Junior (*Bank of British Columbia v. Canadian Broadcasting Corporation*, (1995) 10 B.C.L.R. (3d) 201 (S.C.), at 214):

“... the legislature did not intend that notice would be required under s. 8 of the *Constitutional Question Act* every time a judge was asked to exercise his or her discretion, whether under R.26 or otherwise, in accordance with *Charter* values. If it were otherwise,

the Attorneys General might well be overwhelmed with notices where there was no real challenge to the law, but only as to the manner in which the discretion under that law was to be exercised.”

I also declined to grant the adjournment with a suspension of the effects of the determination. The expedited hearing was convened at the request of Junior. The Director and her witnesses were present. Under Section 113 of the *Act*, the Tribunal has the discretion to suspend the effect of a determination. I was not persuaded that there was any basis on which to adjourn the hearing.

ORDER

I confirm my interim decision.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal